United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

76-2036

United States Court of Appeals
For the Second Circuit

ROBERT RICKENBACKER,

Appellant,

v.

THE WARDEN, AUBURN CORRECTIONAL FACILITY AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

On Appeal From The United States District Court For The Eastern District of New York

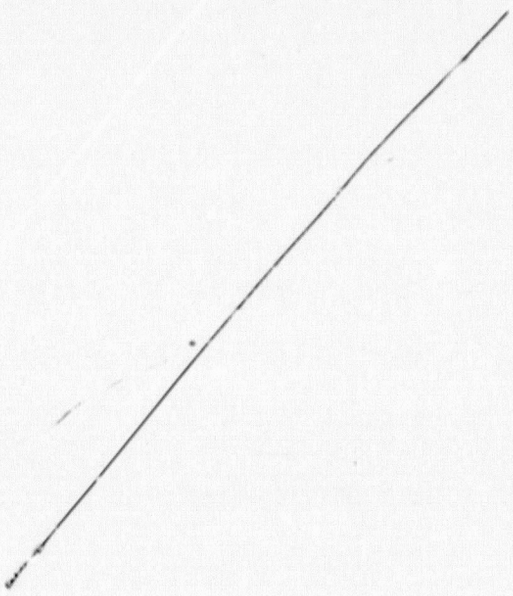
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Appellant's Appendix

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UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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A

DOCKET ENTRIES

76 CV 634									
207-1	75	0634	04	23	75	3	530	APPEAL	0720	PLAIT, J

PLAINTIFFS | DEFENDANTS

RICKENBACKER, ROBERT
ROBERT RICKENBACKER

THE WARDEN, AUBURN CORRECTI(
FACILITY AND THE PEOPLE OF '
STATE OF NEW YORK

CAUSE

HABEAS CORPUS

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76-2036

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U.S.A. ex rel. ROBERT RICKENBACKER vs. THE WARDEN, E

DATE	NR.	PROCEEDINGS
4-28-75		PETITION FILED FOR A WRIT OF HABEAS CORPUS. (1)
9-2-75		By PLATT, J.-Order to show cause dtd 8-28-75 why a writ of habeas corpus should not be issued filed. (2)
1-7-76		Affidavit of Lilliam Z. Cohen filed with memorandum of law. (3/4)
/7/76		Petitioner's Memorandum filed. (5)
-24-76		By PLATT,J.- Memo and order dtd. 2-24-76 that the petition be dismissed and the writ of habeas corpus denied filed. (6)
2-25-76		Judgement that the petitioner take nothing of the respondents and that the petition is idsmissed and the writ of habeas corpus is denied filed. (7)
-27-76		Notice of appeal filed. Copy mailed toC of A. (8)

A TRUE COPY ATTEST
DATED April 27 1976
PY M. Glen

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM PART 3

- -x

PEOPLE OF THE STATE OF NEW YORK, :

:

-against- : Ind.# 3853/'70

: ~~Ster # 5752A~~

ROBERT RICKENBACKER, : Appeal # 9556 -

Defendant. : Jury of 12 plus 3

- -x

October 8,12 & 13,1971

BEFORE:

HON. MICHAEL KERN
Justice

APPEARANCES:

BENJAMIN SCHMIER, ESQ., A.D.A.,
For the People

JOSEPH J. LOMBARDO, ESQ.
For the Defendant
16 Court Street,
Brooklyn, New York 11201

FLORENCE S. CAMPAGNA, C.S.R.
Official Court Reporter

ss

I N D E X

Witness for People	Direct	Cross	Redirect	Recross
Sam Fichera	42	47	--	--
Michael Petrancosta	49	--	--	--
Ptl. Thomas Moore	51	--	--	--
Ptl. Thomas B. Walsh	54	65	--	--
Ptl. Donald Scannapieco	66	73	--	--
Det.Robert Marshall	74,110	87,118	--	--
Dr.Milton A. Wald	118	--	--	--

Witness for Defendant	Direct	Cross	Redirect	Recross
None	--	--	--	--

E X H I B I T S

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For the Defendant	Description	Page
None	--	--

MR. SCHMIER: Judge, may I be permitted to move the case?

THE COURT: Yes. The case is moved. Mr.Lombardo, you're ready, I suppose?

MR. LOMBARDO: The defendant is ready.

MR.SCHMIER: Your Honor, so that we can get a record, and there'll be no doubt of what is being moved, I'm sure Mr.Lombardo will appreciate that I'm not trying to encumber the record, but in 3850 of 1970, there were four defendants indicted. Three of the defendants had their cases disposed of. There is one undisposed case, Robert Rickenbacker. I now move Robert Rickenbacker's case, 3853, '70. People are ready.

THE COURT: Mr.Lombardo answered he was ready.

MR.LOMBARDO: Defendant is ready.

MR. SCHMIER: Judge, I was informed Mr.Lombardo has an application. The People are ready to oppose or consent or whatever.

THE COURT: Well, I think I know what Mr.Lombardo's application is, but that is based upon a preliminary discussion. Of course, the record will now indicate that it is only seven minutes after 10, and we couldn't have had very

discussion, a very lengthy or involved discussion, but in a capsule, it is simply this, that there was a previous trial.

MR.SCHMIER: Yes, sir.

THE COURT: There were four defendants altogether.

MR.SCHMIER: Yes, sir.

THE COURT: Three have been disposed of by trial.

MR. SCHMIER: Yes, sir.

THE COURT: As to this defendant, there was a disagreement. Before the trial began in that case with this defendant as the defendant, there was a hearing pursuant to the United States v. Wade, before Mr. Justice Barshay of this court, and after such hearing, Mr. Justice Barshay ruled that the in-court identification made at that time before him was free from taint, was not the result of any undue influence exercised by any person upon the identifying witnesses and was not accompanied or was not the result of any violence or any psychological or other pressures, as a result of which it might be said that the identification was tainted. Now, that prompted Judge Barshay to rule that the in-court identification could be

submitted by the District Attorney to a trial jury for its consideration.

MR. SCHMIER: May it please the Court, I know that your Honor has the Picture, but this is not so much Rickenbacker per se, but each of the witnesses in the case, as against Morgan, Ferguson and Austin, so that the Wade hearing was by four separate lawyers, each on behalf of his client, so as to civilians; but in Rickenbacker's case, it confined itself to Patrolman Walsh's testimony, and Scarpello's testimony, and they testified, innumerable hours, and I'm only referring to that part of the Wade case which dealt with Rickenbacker.

THE COURT: Well, the defendant Rickenbacker, at that time, at that proceeding, had an opportunity to call and present such witnesses as he wished to.

MR.SCHMIER: Which --

THE COURT: (Int'g) And that hearing was closed.

MR. SCHMIER: Yes, sir.

THE COURT: Witnesses who he wished to, and that hearing was closed.

MR. SCHMIER: Yes, sir.

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THE COURT: And Judge Barshay made the ruling.

MR. SCHMIER: With a specific findings of fact and conclusions of law.

THE COURT: What is your application, Mr.Lombardo?

MR.LOMBARDO: Your Honor, my application, in spite of what has been said here by your Honor, with all due respect,and by my friend, Mr.Schmier --

THE COURT: (Int'g) All we have talked about is the chronological case, with particular reference to the so-called Wade hearing. Now, if I'm in error or if the District Attorney is in error, as to our recital of what transpired up to this point, I wish you'd call that to my attention.

MR. LOMBARDO: Your Honor's recital and Mr.Schmier's recital substantially and basically are correct. However, I would ask the Court's indulgence. I would like to be heard on this motion.

THE COURT: What is the motion,first?

MR.LOMBARDO: First of all, your Honor, the motion is to have a Wade hearing de novo, and

the motion is predicated on the fact, your Honor, that the original trial, there were four defendants; two of the defendants, three of the defendants, as a matter of fact, were apprehended practically at the scene of the crime within a matter of minutes. The defendant, Rickenbacker, was not apprehended until some nine months later.

THE COURT: Were these matters presented at the previous hearing?

MR. LOMBARDO: Yes, your Honor.

THE COURT: All right.

MR. LOMBARDO: Now then, the testimony that tends to link Rickenbacker to this alleged crime is the testimony of a police officer who testifies that when he was in hot pursuit of two defendants, one of whom they apprehended, he had a look at the face of Rickenbacker, as he turned once or twice to see if he was being pursued by this same police officer. So, that's one time when he testified he saw him, and the next time he testified he saw him was in court, some nine months later, after much time had passed and after he made other contacts with other people accused of crime. In this case, your Honor, there was a

disposition of three of the cases, as Mr. Schmier has indicated, but I say in view of the fact that three of the defendants, your Honor, were apprehended, there was no question at all about the fact that they were apprehended at the scene of the crime.

THE COURT: They've been convicted; is that right?

MR. LOMBARDO: Two were convicted, and one pleaded guilty.

THE COURT: There were three convictions.

MR. LOMBARDO: And as to the defendant Rickenbacker, the jury disagreed. So, I say, your Honor, in the interest of justice, I think, in view of the scanty opportunity for identification in this case --

THE COURT: (Int'g) Well, Judge Barshay didn't think that it was a scanty identification.

MR. LOMBARDO: Well, Judge Barshay --

MR. SCHMIER: (Int'g) Excuse me, Mr. Lombardo --

MR. LOMBARDO: (Int'g) Please let me finish.

MR. SCHMIER: You're right.

MR. LOMBARDO: Judge Barshay, your Honor, struck out some of the identification and he struck

out some of the statements supposedly made, and he allowed it to go to the jury, the question of identification by the police officers based upon their observations of the defendant as have been outlined.

THE COURT: Whatever his ruling was then, limited or otherwise, is the law of the case right now with regard to permitting the in-court identification to be presented to a trial jury.

MR. LOMBARDO: Your Honor, that is why Mr. Schmier and myself and now, I understand from what your Honor has said, that you and I seem to have a point of disagreement. I believe this is a brand new trial and this is a de novo proposition.

THE COURT: It is brand new.

MR. LOMBARDO: And I did think that your Honor was going to preside at this trial, should have the opportunity to judge for himself and then make a ruling with reference to the identification, whether or not it was tainted, whether or not there was sufficient opportunity for observation, and as I say, particularly in view of the fact, your Honor, that there were just these two short instances.

One was an in-court identification, which, in and of itself, may have been tainted by reason of the fact that the defendant was, sitting here, properly identified to the police officers when they testified in court. The only other identification in the record that seems to bear out the in-court identification is this fleeting glimpse by one of the police officers by the defendant.

THE COURT: And that becomes a question of fact. The only question, if you read United States v. Wade, is, was this in-court identification of such a nature as to prompt a Judge to make an order directing the District Attorney to refrain from submitting it to a jury on the grounds which are set forth in the United States v. Wade, and there has been a hearing on that subject. It doesn't make any difference before whom that hearing was held or when it was held. Suppose, Mr. Lombardo, suppose Judge Barshay had gone to trial? Suppose there had been a mistrial, during the trial, a motion for the withdrawal of a jury had been granted.

MR. LOMBARDO: That's what happened in this case, your Honor.

THE COURT: Did it happen in this case?

MR.LOMBARDO: Yes.

THE COURT: Before submission to a jury?

MR.LOMBARDO: No, when the jury could not agree.

THE COURT: But you understand the distinction I'mdrawing?

MR.LOMBARDO: I didn't know whether or not your Honor was aware that --

THE COURT: (Int'g) Suppose, during the trial, something was said which, as a matter of law, would justify a Court in granting a motion for a mistrial, do you mean to say, Mr. Lombardo, that if the District Attorney moved the case the following week, that there would have to be an altogether new hearing pursuant to the United States V. Wade? Now there a brand new trial was being begun.

MR.LOMBARDO: There is a difference, your Honor. The difference, as I say, is that on the first trial there were four defendants being tried, three of whom, without questions, had been apprehended at the scene of the crime within minutes after the crime.

THE COURT: But all of that was presented

to Mr. Justice Barshay.

MR. LOMBARDO: Yes, your Honor, but he had these other defendants involved. I think it might have colored the Court's view of whether or not this was a tainted identification.

THE COURT: Mr. Lombardo, of course you're now indulging in fantasy. It is to be assumed that Mr. Justice Barshay made independent decisions with regard to each separate defendant.

MR. LOMBARDO: That he did, your Honor.

THE COURT: Now, even if we went through a full-scaled hearing now, I would do that, too, but there is no need for another hearing because we've already had one. I don't think United States v. Wade ever intended multiple hearings, one after the other, where there is a disagreement by a jury, where you may have a half-dozen mistrials during the trial of any particular case, it would follow, therefore, logically, if what you say is so, that if the case were put on the calendar of some other judge each time, different judges, that there would have to be a new Wade hearing. I don't believe so.

MR. LOMBARDO: Well, your Honor, if I may be permitted again, with all due respect to

your Honor's learning and wisdom, I think if your Honor's reasoning were to be followed to its logical end, then it wouldn't even be necessary to have another trial. You could simply read or take for granted what transpired at the other trial and present this to the jury.

THE COURT: I'm not even taking anything for granted, except the ruling made by Mr.Justice Barshay. I didn't hear the evidence. I didn't hear anything, but Mr.Justice Barshay did, and he ruled on the one proposition, is this in-court identification to be presented to a trial jury.

MR.LOMBARDO: Well, your Honor, can't we use the same logic then to any rulings that were made by the Court in the course of the trial? Would they be binding by your Honor or Mr.Schmier or myself?

THE COURT: No, that would be different. Justice Barshay might view an offer of proof by the District Attorney or the defendant at one way during the trial, and I might view it another, but this is basic, that is mandated by the United States Supreme Court, and the one question, the only question is whether or not there is a taint with regard to the in-court identification.

He has already ruled that there isn't.

MR.LOMBARDO: For the purpose of that case.

THE COURT: You see, there is an adjudication. You're talking now about an in-trial ruling. Now, there is no adjudication -- you couldn't say that that is res judicata, except in the case before Judge Barshay, but here the case is now before another Judge. The Wade matter was presented for determination by Judge Barshay, and he has determined it. Of course, in the final analysis, the trial jury has to determine whether or not the identification is such which would bear the weight of the conviction. But I'm not going to go into that again.

MR.LOMBARDO: Your Honor, I made my motion clear.

THE COURT: Mr.Lombardo, you are absolutely right. You have the right to make the motion, but I likewise, as you know, have the right to make a determination and I'm denying your motion for another so-called Wade hearing.

MR.LOMBARDO: Your Honor, may I also beg Mr.Schmier's pardon. He wanted to say something before, and I realized that I have to argue

with Mr. Schmier, and your Honor, I might have been thrown off the track, and that is why I asked you to allow me to finish. You may have the floor now. Your Honor, I take exception.

THE COURT: Of course you have an exception.

MR. SCHMIER: Judge, I had a point to make, but now that you ruled, I imagine my point was superfluous, but just for Mr. Lombardo's edification, I hoped that you would permit me to throw the point into the air. Would you permit me?

THE COURT: Sure. Of course, I might change my mind.

MR. SCHMIER: If you do, I'll accept it.

THE COURT: Yes.

MR. SCHMIER: Supposing Judge Barshay had found the officer's identification in court to be tainted.

THE COURT: I see what you're getting at.

MR. SCHMIER: And now I want to use it and take Mr. Lombardo's argument, and say this is a new case, I'd like you to rule on it.

THE COURT: You wouldn't get to first

base.

MR. SCHMIER: And that my answer was that if I can't get to first base, why should he run to first base.

THE COURT: Well, except --

MR. SCHMIER: (nt'g) This was my argument, Judge. And I offered it. I just wanted you to see that Mr. Lombardo's position was untenuous because what is good for the defendant is certainly good for the People.

THE COURT: Well, of course, not according to present day thinking. Present day thinking runs in a certain direction, that all defendants are entitled to so much more than legally they are entitled to. I don't follow that view at all. Whether it helps or hurts the District Attorney, or helps or hurts the defendant. This is a matter which is decided. I'm not going to have another hearing on the same subject. All right. Defendant has an exception. All right. Call the jury.

MR. LOMBARDO: Your Honor, may I ask your indulgence, before your Honor calls in the jury? May I have about five minutes with this defendant? I've read some documents that Mr. Schmier was kind enough to show me.

THE COURT: I don't like to keep the jurors waiting out there.

MR.LOMBARDO: Just a few minutes.

THE COURT: Go right ahead. This is another thing, Mr. Lombardo, which you ought to know for the record, and while it was not in my mind at the time that we discussed this, everything which is on the record now, I'm prompted now to present another argument. Suppose you had had a pre-trial hearing on a motion to suprress? Suppose you had had a pre-trial hearing on a motion to suppress tangible property, and the proceeds or the results of an eavesdropping situation or anything along those lines, or even a motion to inspect grand jury minutes. Well, that's far fetched of course, Would you just, because there is another trial, urge that the Court conduct another motion, a hearing on a motion to suprress? Certainly not.

MR.LOMBARDO: You mean on a Stovall type motion?

THE COURT: No, a Stovall type motion is not directed to the motion to suppress, except in its wider ramifications with regard to due processes, and that is what Stovall is concerned with.

But take a motion, a so-called Huntley hearing, as to the voluntariness of a statement or a confession, would you expect the Court to hold another hearing on that subject?

MR. LOMBARDO: It would seem to me, your Honor, and what I understand, I understand in good faith, I honestly and truly believe what I told your Honor. It think it is a new trial and a new Judge, and particularly in this case where you had four defendants originally, where it was extremely difficult and arduous, even for a judge of Judge Barshay's great learning, to keep everything separate and apart, which I think he did very well. It is a completely different situation. Here there is only one defendant, your Honor, on trial.

THE COURT: I understand the point.

MR. LOMBARDO: All I can do is urge it and try to convince your Honor.

THE COURT: You have your exception.

MR. LOMBARDO: May I respectfully have an exception?

THE COURT: Yes, you have your exception.

(PROSPECTIVE JURORS WERE BROUGHT INTO COURTROOM AT 10:30 A.M.)

(Whereupon A jury of 12 plus 3 alternates were duly impaneled and sworn)

THE COURT: Now, members of the jury, the law directs that immediately upon swearing of the full jury, the presiding Judge gives you a preliminary charge relating to your duties and your duties and responsibilities of the Judge, and to explain the basic or elementary concepts of our law. I'm not going to do that at this time. I would prefer to do that Tuesday morning as soon as we reconvene, and I shall do so before the opening statements. This case must be considered as continuing right on now as if there is no recess at all. But we'll simply reconvene Tuesday morning, October 12th, at 10 o'clock sharp, because of the intervening holiday. What I will say to you, however, is something else.that the law directs I say. As we part company now, I will make this statement, and this statement must be remembered by you every time we part company. It will be unnecessary, of course, for me to repeat it. I may repeat it, however, In any event, you must remember that from this point on, you

must not discuss this case. You must not talk about the case among yourselves. You must not talk about the case with anyone else at home or any other place. You must not permit anyone to talk with you about the case. Should anyone talk with you about the case, report it to the Court at your earliest opportunity. Let no one speak with you about this case. I would say to you at this time, if you know anything about the area where this is alleged to have occurred, not to go there. I shall have occasion to tell you that during this trial. I will not mention it any further at this point because no statement has been made. No evidence has been adduced. You do not know any more than I know at this time where this alleged incident occurred. The incident that gave rise to the accusation against the defendant. You must not go anywhere near the scene of that area during this trial. You must not do so.

Should you, at home or any other place, while listening to radio or television, hear some mention made of this case, I doubt very much that there will be any mention made of it. Should you, however, hear any reference to this

case on trial in this court, turn to something else. Go to another channel on radio or television. Do not pay any attention. Do not listen to what may be said. Should you, over the weekend, while reading a newspaper, see anything that, in your judgment, might have some bearing upon this particular case, turn to some other part of your newspaper. Do not read anything whatever about this case or anything which will reflect upon your consideration of this case.

Now, as has been said earlier, this seems to have been the agreement made by counsel on both sides. They ought to let the Court in on the secret, but I suppose what they said was in the nature of a suggestion. I think the suggestion is a good one. To begin now, that would hardly be likely, because the Court has five other matters to take up. To continue today would mean that I would have to preliminarily charge you as to your obligations and responsibilities, and mine at 2 o'clock, and counsel on both sides would make opening statements, I suppose, and although the District Attorney, under the law, must make an opening statement, the defendant, under the law, is not required to make any opening statement, if he does not wish to, and no inference may be drawn therefrom.

However, it would be late in the afternoon before I asked the District Attorney to begin calling his witnesses, and I think that the better part of wisdom would be to recess now. I'm sorry that we have this intervening weekend, but we do have to celebrate --is this the discovery of America or the birth of Columbus?

MR.LOMBARDO: Discovery of America,Judge.

THE COURT: We do have to do that. So, we'll do that on Tuesday. So, with the admonition that I justgave you, and the advice that I just gave you, we'll part company at this time, and the Court Officer will take you to the jury room only for one purpose, so that you might take a look at the room number. The Court Officer will explain to you how you can get to this jury room and on Tuesday morning, go directly to the jury room. Do not go to Central Jury. Do not come here. Go directly into the jury room and you'll sit there and the Court has a short calendar, I suppose, on Tuesday morning. I assure you, I'll be no more than 15 minutes with that calendar.

So, please be in the jury room by 10'clock, or five after 10, and we'll continue with this trial at that time. Have a nice weekend madam and gentlemen, God willing, we'll see you Tuesday

morning at 10'o'clock.

MR.LOMBARDO: Your Honor, may I at this time ask the Court's indulgence for daily copy? I'm an 18-B attorney.

THE COURT: I haven't got the power to do that, Mr.Lombardo. We've had this out so many times. I can say to you, you can have daily copy, Mr.Lombardo, provided you pay the reporter, and then you'll have to take it up with Judge Malbin. See, the trouble is, Judge Malbin, I think, allows 11 cents a folio, and they charge a lot more than that. Now, if she gives you daily copy, and she relies on Judge Malbin, then she's going to do this at a loss because the typist charges more than Judge Malbin allows.

MR.LOMBARDO: I didn't do it.

THE COURT: So, you have to pay it out of your pocket, or I have to pay it out of my pocket. And at this moment, I haven't got the cash. Maybe you ought to take it up with Judge Malbin.

MR.LOMBARDO: I'll talk to Judge Malbin.

(OFF RECORD DISCUSSION)

****

(October 12, 1972)

(JURORS PRESENT. BOTH SIDES PRESENT)

(AT 10:30 A.M. THE FOLLOWING OCCURRED)

THE COURT: Let the record indicate, so that the jurors will understand. The Court, at the request of Mr. Hansome, who telephoned to my chambers this morning, the Court had a conference with Mr. Hansome, who occupies seat number 7, and Mr. Lombardo, counsel for the defendant was there, and Assistant District Attorney was there. This conference had nothing whatsoever to do with this case. Nothing whatever. And jurors are to draw no inference of any kind whatsoever about the conference, that the conference had anything to do even remotely with the case on trial.

Now, good morning, gentlemen and madam. I should have said that before I started.

THE CLERK: Jurors please answer to name.

(AT THIS TIME ROLL CALL WAS TAKEN OF JURORS AND ALTERNATES)

THE CLERK: All jurors present. Defendant present with counsel. The District Attorney is present

THE COURT: Again. Off record.

(OFF RECORD DISCUSSION)

THE COURT: Gentlemen, let me say further, along the lines which I followed before the roll call. The situation which necessitated this delay, and this conference, was the fact that there was a fire at the home of Mr. Hansome, and it is a matter of getting word to his home with regard to certain matters which he was to take up with some one this morning in connection with that fire.

Gentlemen, we recessed on Friday at a certain point in the trial. That point was reached when both the District Attorney and counsel for the defendant announced that the jury was satisfactory. the jury and three alternates were sworn, and all the jurors and the alternates are here this morning. At that time, I told you that in accordance with the law, I would, this morning, advise you of certain matters which the law directs I tell you immediately after the swearing in of the jury.

I did tell you, of course, and I said I might repeat the advice which I gave you then, that jurors must not confer, must not speak with one another about the case until the jurors are told that they are to begin their deliberations in the privacy of the jury room. I advised you further,

that you must read nothing concerning this case should anything be printed in the daily press. You should listen to nothing should anything be said on the air, either television or radio, and I told you that I doubt very much that any comment would be made over radio or television, or that there would be a single word in the press about this case. In any event, I say you must turn to something else should you see anything in any newspaper which might even remotely, in your own mind, reflect upon the case in which you are sitting as judges, of the facts, as jurors. I told you further, that you must not go to the scene or the area where the crime charged in the indictment allegedly occurred. You did not, on Friday, know the site or the area or the location, but you will know it very shortly, and the advice which I gave you on Friday holds just as good, and you may consider that I repeat that advice just as emphatically as I did then.

Every time we part company, whether it be during the day or at the close of the day's work, you must not go to the area where this allegedly occurred. You must not speak with anyone nor

let anyone speak with you. Should anyone talk about the case, report it to the Court immediately.

Now, gentlemen, as to that which I said I would discuss with you Tuesday morning, that is today. You understand, of course, that we are about to be engaged and we are, as a matter of fact, engaged in the trial of the People of the State of New York against the defendant in this case, whose name is Robert Rickenbacker. He is charged with the crime of Murder. You will find as we proceed in the trial of this case, that there is more than one count in this indictment. The crime of Murder is charged in two counts of the indictment. The first count charging Murder under Section 125.25, subdivision 3.

MR. LOMBARDO: Your Honor, may I interrupt you at this moment with all due courtesy?

THE COURT: Yes.

(OFF RECORD DISCUSSION AT THE BENCH)

THE COURT: As I said, the first count of the indictment charges the defendant with the crime of Murder. You see, we do not have Murder First Degree, Murder Second Degree any longer. The law was changed on September 1, 1967, and

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murder now is not divided into degrees.

Now, under the first count, as I said, the defendant is charged with the crime of Murder under section 125.25 of the Penal Law, subdivision 3 of that section. Subdivision 3 of that section privides that"One who, while committing or attempting to commit the crime of robbery, and in the course of and in furtherance of the commission of such crime,causes the death of another person, is guilty of Murder." That is subdivision 3 of Section 125.25, and this count, the first count, is predicated upon that section and upon that subdivision.

The second count also charging Murder, is predicated upon the same section, 125.25, subdivision 1, and that is defined as follows: "One who, with intent to cause the death of a certain person, actually causes the death of such person." That's the first subdivision. That first subdivision says nothing at all about the commission of a felony or commission of robbery or the attempt to commit a robbery. Do you understand? But we're concerned now with only one event, and that event, according to what is charged in this indictment, took place on or about

July 30 of the year 1970. And during the commission of the alleged crime or at that particular time on July 30, 1970, a man by the name of Vito Petricosta came to his death. He died as a result of a shooting. The defendant is charged in this count, in both the first and second counts with having been one of the men who were engaged in a robbery, and who caused the death of Vito Petricosta.

You will understand, gentlemen, and madam, of course, from what has been said by counsel on both sides and what was said by me, that you're here to serve as judges of the facts, judges of the believability of witnesses. You see, the court is composed of two component elements. One is the Judge who presides at the trial, and then we have the jurors. Jurors, we say in law, are the sole and the exclusive judges of the evidence, and of the believability of witnesses. That is so. That will be your job. Jurors must accept the law as the Court gives them the law. Jurors have no right to disregard what the Court says is the law. Jurors have no right to institute their own version or their own opinion of the law for what the Judge charges them is the law.

Jurors have no right to add to the body of laws which will be referred to by the Judge. In other words, jurors have no right, at any time during the trial, to say, "Well now, Judge Kern charged us thus and so as the law. I don't think that is good law, and I'm not going to pay any attention to that." What you're doing then is repealing the law. Nor do you have a right to say, "The judge didn't say anything about this, but I think thus and so ought to be the law." Nor do you have a right to say "The judge didn't say anything about this, but I think thus and so ought to be the law." There, you're making new law, legislating, and we here in this country, as you, madam and gentlemen know, pride ourselves in being a country of laws and not of men. Men do not ban together in a small smoke-filled or nice clear room, whatever the case might be, and decide thus and so is the law. It is not done that way.

Laws are made by representatives of all the people duly acceptable in Albany or the Halls of Congress, and we guide ourselves by those laws. Those laws are made to govern everybody. Those laws are made by representatives of the defense, by your representatives, by mine, by counsel and

the representatives of counsel on both sides. So, you see, gentlemen, you must accept the law as I give you the law. As I indicated, you have the sole and the very important duty of determining where the truth is as to what happened on this 30th day of July, 1970.

The Judge has a different job. He must advise you as to the law. He must see that an orderly trial is conducted. He must see that that which shouldnot be placed before a jury does not actually come before a jury, and that only such evidence which jurors are permitted under our laws to hear is presented to them. That is my job. And as I said, you must, without any question, without any reservation, without any modification, accept the law as I give you the law. Otherwise, we have nothing but chaos. We have nothing but confusion.

Now, under our law, madam and gentlemen, every defendant is presumed to be innocent and that presumption remains with the defendant even while you're deliberating in the jury room. That is the case under our criminal jurisprudence. That presumption of innocence remains with every defendant accused of the commission of a crime

until should the time come that the jurors are satisfied, beyond a reasonable doubt, that the defendant's guilt has been established. If that time does come, the presumption of innocence disappears completely. It does not exist any longer. The burden of extablishing guilt beyond a reasonable doubt lies with the District Attorney. He has the burden throughout the trial.

What is meant by "beyond a reasonable doubt"? I shall charge you later in this trial as to the exact meaning or as to the legal meaning of the words, "beyond a reasonable doubt." And you must accept the definition of those words from me as I give you those words. As I said, the burden is upon the prosecution to prove guilt beyond a reasonable doubt.

No defendant, under our law, is obligated to prove his innocence. You see, there is a difference. The defendant does not have to prove his innocence. No defendant has to offer any such proof. The defendant has a right to sit where he is seated and utter not a single solitary word.

In order to find any defendant in a criminal case guilty, you must be convinced beyond a reasonable

doubt by the evidence which is presented in court before the Judge and before the jury. The defendant does not have to move forward at any time to establish his innocence. Of course, a trial, to be a trial under our American system, there must be no prejudice whatsoever. There must be no sympathy. Jurors must not predicate their verdict. They must not permit their verdict to be tainted in the slightest degree by prejudice against the defendant nor must jurors be sympathetic towards the defendant to the extent that their judgment might be affected one way or the other by sympathy for a defendant. In other words, jurors must envision themselves, I think I had occasion to say this before, away up there on that proverbial cloud, looking down at these proceedings, watching the witnesses and listening to what they have to say, and no matter who it might help or hurt, no matter where the chips might fly, make a determination upon the evidence and upon the law. All right. Now, gentlemen, please come up.

(OFF RECORD DISCUSSION AT THE BENCH)

THE COURT: Mr.Foreman, and madam and gentlemen, we will have a ten minute recess. Do

not discuss the case among yourselves. Form no opinion. Just relax in the jury room for 10 minutes. We can have one of the jurors make a telephone call that might just help solving his problem. All right. Gentlemen, madam, retire to the jury room. As I said, do not discuss the case and form no opinion.

(RECESS)

(AT 11:07 A.M. TRIAL RESUMED. ALL PARTIES PRESENT)

THE COURT: Mr.Foreman and madam and gentlemen. We are now approaching the second phase of the trial. The District Attorney will make an opening statement. Please understand that I am not arbitrarily designating the District Attorney as the one who is to proceed first with his opening statement. The law says the District Attorney must make an opening statement, and his opening statement shall be the first statement made to the jury. Please understand, gentlemen, madam and gentlemen, that what is said in opening is not evidence in the trial. The evidence which you will consider is that which comes from witnesses who take the witness stand, who, after having been sworn, give their testimony. The opening, or that phase of the trial which referred to as the opening

statement has but one purpose, and that is to permit counsel to place before the jury a skeleton outline of what he hopes or expects to prove during the trial. The purpose is not to argue, it is only to place before you that which counsel hopes or expects to prove during the trial. You will now, madam and gentlemen, hear from Assistant District Attorney Schmier. All witnesses will be excluded from the courtroom. There will be no talking, no discussion during the trial.

MR. SCHMIER: On July 30, 1970, a superette was located and is still located at 1555 Nostrand Avenue, which is at the corner of Albemarle Road, the dead end of Albemarle Road. That superette was owned by a man named [illegible] helping him, and in and out of the store was Vito Petrancosta and his son, Michael Petrancosta. About 6:30 in the evening, three men came into the store and surrounded the cash register and Vito Petrancosta, and said, "This is a hold up", or "This is a stick up", and one had a gun, and he will definitely be identified to you as a man whom Judge Kern has instructed you time and time again, you are not to concern yourselves with at this time.

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His name was Zachary Morgan, and at that time a second man will be identified to you as having been in the store, also, you are not to concern yourself, David Ferguson. The third man is not identified and will not be identified through the prosecution by anybody who was in the store at the time. But suffice it to say that the elderly man, Vito Petrancosta, who is now dead, would not submit to robbery, and Morgan fired a shot, one shot, which Dr.Wald, the medical examiner, will tell you and trace for you was the cause of death of Vito Petrancosta. Five dollars and some personal papers were taken from the register, and the three men ran out of the store. The owner of the store,Sam Fichera, will be a witness here and he will testify that he had a license for a gun. He ran after the three men and he fired a shot up in the air from his gun, which he had on his person, and he fired a shot in the direction of the three men. We concede that the shots fired by Fichera did not hit or inflict any wound on any of the three men. However, Fichera's shots are heard by two police officers who are only one block away on Albemarle Road, and Patrolman Walsh is outside the radio car and he walks up Albemarle Road, and as he walks up Albemarle Road in the direction of the shots

that he heard, he seen three men running , two of whom have guns in their hands. He will tell you of the chase that he gave,and his partner, Patrolman Scannapieco, followed the three men with Walsh, and the three men tried to get into a parked car in which a fourth man, the driver of the car, was seated behind the wheel. One of the men succeeded in getting into the car, Morgan, he's the fellow who had the gun in his hand, and Scannapieco will tell you that he disarmed Morgan and arrested Morgan, who had jumped into the car, and Austin, who was sitting behind the wheel. Patrolmen Scannapieco and Walsh will testify that, and tell you that the two men could not get into the car for some reason, and they ran away, but as they ran, they were full face to both officers, and the officers will tell you that the two men who ran and was followed by Walsh, because if you can picture it in your mind, Scannapieco is now covering Morgan and Austin as they're in the car. He's got them with his gun, and Walsh proceeds on foot to run after the remaining two men, both of whom have guns in their hand. Morgan had the gun and another man had a gun, and as you will see he --Walsh is now chasing one man

who has a gun, and one man who does not have the gun, because the second man with the gun is now apprehended inside the car --Morgan.

Walsh will tell you the number of times that he had to see the full face of both men. The length of time he chased them and that the two men that he chased, the man without the gun was David Ferguson, whom he caught. And the other man running with the gun was Robert Rickenbacker, whom he did not catch, because by the law of physics, you can only catch one man if the both of them, at a certain point, separate, and you can only go after one, and he chose to get Ferguson Rickenbacker got away. But before he got away, Walsh saw him throw his gun to the ground between two parked cars and after he apprehended Ferguson, he went back and at the very point where Rickenbacker threw his gun, Walsh picked up a gun and that gun will be introduced by the People, in evidence.

The detectives immediately, or as soon thereafter as he could, and by the sharpest of coincidence, the detective's name is Walsh, and I'm hoping you don't get the two confused. One is a patrolman, and one is a detective. No relationship. I believe I'm right on that. I'm sorry the detective's

name is Marshall. Detective Marshall. Detective Marshall speaks to the three men who are captured and within a few hours, give and take a half hour, within two or three hours, Detective Marshall goes to the home or what is alleged to be the home of the defendant Rickenbacker, at 93 Decatur Avenue.

MR.LOMBARDO: Your Honor, I dislike interrupting, but I must certainly object strenuously to what the Assistant District Attorney has just said, and I move for the withdrawal of a juror.

THE COURT: No, Mr.Lombardo, under the law, the District Attorney has a right to prove, of what I assume he is telling the jury he will prove now, flight. The District Attorney has a right to establish that and while he says that the police officer went to a certain address, there is no proof in the record yet that that address is the address of the defendant. This is what the District Attorney expects to prove.

MR.LOMBARDO: That's what he said before. It is what he said before that, your Honor, that I object to.

THE COURT: I will permit him to prove during the trial, if he can, of course, that efforts were made to find the defendant.

MR.SCHMIER: One hundred per cent. I am now addressing the jury on the legal question of flight.

THE COURT: The objection is overruled.

MR.LOMBARDO: Respectfully except, your Honor.

THE COURT: Yes, you have your exception.

MR.SCHMIER: And with Mr.Mr.Lombardo's exception, which is perfectly taken, I might digress for a minute and say that the defendant was apprehended nine months after the killing of July 30th, and after being arrested and giving his pedigree, which is the only thing we're allowed to tell you at this time that he said, he gave his home address as 93 Decatur Avenue, and 93 Decatur Avenue is where Detective Marshall went that very night. The law does not permit me to tell you what Detective Marshall said to anybody and what anybody said to him. But we will prove that Detective Marshall spoke to the father of the defendant, the mother of the defendant, and on subsequent days and months and weeks to the fiance of the defendant; to the defendant's friends, that he went to every known place that the defendant is alleged to have frequented, and nine months later, we, the police, apprehended the

the defendant and we will show, as part of our proof, that at no time, even when apprehended, did the defendant surrender voluntarily, but that we picked him up on this charge. Based on the identifications of the two officers and based on the flight, which Judge Kern concerned himself as a matter of law, and over which I will not concern, the People will ask you to find the defendant guilty of felony murder in that under the law, as described to you and laid out for you by Justice Kern, the defendant participated as an accomplice in the killing, hold up and murder of Vito Petrancosta.

THE COURT: Let me say that I've asked the clerk to make some effort to get the custodian in the building to stop the knocking. I don't know --

THE CLERK: (Int'g) We sent a court officer out now, Judge.

THE COURT: The source has to be located, but I think the custodian or the engineering office will know just what is causing the trouble.

MR. LOMBARDO: Your Honor, I move to dismiss the indictment on the opening of the Assistant District Attorney.

THE COURT: The motion is denied.

MR.LOMBARDO: Defendant waives opening, your Honor.

THE COURT: All right. Mr.Foreman and madam and gentlemen. You have just heard counsel say that defendant waives opening. The defendant has a right to :waive making an opening statement. The defendant has chosen not to make an opening statement. No inference is to be drawn therefrom by the jury. All right. Please proceed.

S A M F I C H E R A, residing at 1555 Nostrand Avenue, Brocklyn, New York, called as a witness on behalf of the People, having first been duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. SCHMIER:

Q Mr.Fichera, what is your connection, if any, with the superette at 1555 Nostrand Avenue?

A That's my business.

THE COURT: What kind of business is it?

THE WITNESS: Grocery. Superette.

Q Mr.Fichera, can I impose upon you, this last juror has to hear you. Please speak a little louder so he can hear you?

A Yes.

Q How long had you owned that business?

A About 10, 11 years.

Q Now, do you remember the events of July 30, 1970?

A Yeah.

Q Pardon?

A Yes.

Q And at about 6:30, where were you?

A I was waiting on customers in the back of the counter.

THE COURT: Is that 6:30 P.M.?

THE WITNESS: Six-thirty P.M.

Q Was anybody else in the store assisting you in the operation of the store?

A There was nobody assisting me. There was the son of the deceased and the deceased was --was in the store with me.

Q What is their relationship to you as far as blood relationship?

A What's his name, the deceased is my cousin.

Q Vito?

A Yes.

Q And his son's name is Michael?

A Yes.

Q Mr.Fichera, in your own words, tell us what, if anything, happened at that time?

A While I was taking care of the customers, I seen two fellows, one on my left and one on my right, and another man come in, which I didn't recognize. I didn't see him because I didn't see his face because I was interested more --

MR.LOM BARDO: Your Honor, I must object to this. May I respectfully request --

THE COURT: (Int'g) Up to the point where he says "I didn't see his face," that will be permitted. What the witness has added is stricken from the record.

MR.LOMBARDO: May I respectfully request that we proceed by question and answer?

THE COURT: No, the request is denied. Proceed, please.

Q Mr.Fichera, do you now know the names of the people whose face you did see?

A Who what?

Q Whose face you saw? Do you know their names?

A Zachary Morgan and Ferguson.

Q David Ferguson?

A Yes.

Q Now, tell me what each of them did at that time?

A Well, Ferguson was asking me to open up the drawer, which I did, and he was taking the money out, and Zachary had the gun on me and Vito.

Q And where was Vito at the time with relation to the register?

A Vito was behind me.

Q What, if anything, happened at that time?

A Well, Vito, from what I understand, he moved.

MR.LOMBARDO: Objection, your Honor.

THE COURT: Just tell us.

A Vito was taking care of the dog because I told the dog to go in the back.

THE COURT: Just a moment. The objection is overruled.

A I told the dog to go in the back because when there are customers --

MR.LOMBARDO: (Int'g) Objection, your Honor.

THE COURT: You said Vito moved?

Q What happened after Vito moved?

A I heard a shot.

Q And where did that shot come from?

A Zachary Morgan.

Q What happened after you heard the shot coming from the direction of Zachary Morgan?

A I threw a gallon jug of something and I went to help Vito. He came out and says,"I'm shot."

Q And where was he, standing or lying down?

A He was standing at the time.

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Q Now, after he told you he was shot, what happened after that?

A Well, I was holding him, and he was bleeding and then somebody came out and says "They ran out."

MR.LOMBARDO: Objection, your Honor.

Q Just tell us --

THE COURT: (Inb'g) Strike out that part of the witness' answer after "I was holding him."

MR.SCHMIER: Your Honor, may I be permitted to tell Mr.Fichera, who is a layman? You're not allowed to tell us what anybody said to you. Do you understand that?

THE WITNESS: Yes.

THE COURT: Someone did say something.

MR.SCHMIER: Somebody said something.

Q What did you do after somebody said something?

A I put Vito down and I ran out and I --towards the middle of the block. I shot one shot up and one shot at them.

Q You shot from what,Mr.Fichera?

A I had a gun, a license for a gun.

Q Pardon ?

A I have a license for a gun.

Q You have a permit for the gun?

A Yes.

Q What kind of gun was it?

A Thirty-eight.

Q And you fired two shots?

A Right.

Q And did you fire those shots in the direction of the three men who were running?

A I only seen two men running.

Q All right.

A I shot in that direction.

Q Now, did there come a time later that you saw Morgan and Ferguson?

A Yes.

Q How long after you fired the shots would you say?

A About 15 minutes.

Q And where were they at the time?

A They were in the cops' car, the patrol car.

MR.SCHMIER: Your witness.

CROSS-EXAMINATION

BY MR. LOMBARDO:

Q Did you say you own a 38 Smith and Wesson?

A Yes.

Q After this incident that you've testified to, was that weapon ever examined ballistically by the Police Department?

A They did. Somebody that came at --the Police Department checked it out.

THE COURT: Did someone examine it, yes or no?

THE WITNESS: Yes, at the Police Department.

Q By examining it, did they fire the gun?

I don't know.

MR.SCHMIER: Objection, your Honor.

THE COURT: Objection sustained.

Q What did you see them do?

MR.SCHMIER: Objection.

THE COURT: They examined it, he said.

A I handed them the gun and they went in another room and I don't know what happened.

Q How long did they have the gun?

A What's that?

Q How long did they have the gun?

A Not long, about half an hour after I was being questioned at the police station.

Q And --

THE COURT: (Int'g) They gave the gun back to you?

THE WITNESS: Right.

Q They gave the gun back to you?

A Yes.

Q Did you hear the gun being fired at any time?

MR.SCHMIER: Objection, your Honor.

THE COURT: You heard the gun fired when you fired it? You say you fired two shots?

MR.LOMBARDO: I don't mean that, your Honor. While the police had it.

THE COURT: Objection sustained.

MR.LOMBARDO: I have no further questions.

M I C H A E L P E T R A N C O S T A, residing at 1555 Nostrand Avenue, Brooklyn, New York, called as a witness on behalf of the People, having first been duly sworn, testified as follows;

DIRECT-EXAMINATION

BY MR. SCHMIER:

Q Michael, how old are you?

A Nineteen.

Q And your father, your late father, may he rest in peace, was Vito Petrancosta; is that right?

A That's correct.

Q Did you see something happen to your father on July 30, 1970, at 1555 Nostrand Avenue?

A Yes.

Q That's a superette, isn't it?

A It is a grocery store, yes.

Q And were you in the grocery store at that time?

A Yes.

Q What did you see happen to your father, if anything?

A Well, he was shot during a hold-up attempt.

Q Tell us what you saw happen there at that time?

A You want from the beginning?

Q From the beginning, please.

A Well, I was getting ready to eat. I had the pot in my hand and everything.

MR. LOMBARDO: I'm going to object to this, your Honor.

THE COURT: Objection overruled.

A I was coming from the back of the store to the front of the store, and there is like a meat counter on the side, and the pot which had the macaroni, which I was going to eat, was in the corner. So, I bent down to get some macaroni and I noticed this man standing by the swinging door with a gun in his hand.

THE COURT: Which man?

Q Do you know his name now?

A Zachary Morgan.

Q Yes?

A And he said something like "Don't anybody move. Nobody will get hurt."

Q Did you see --did there come a time that you saw other men in the store in addition to Zachary Morgan?

A Well, the time that I noticed there was other men was, there was another guy by the register.

Q Do you know his name?

A I didn't identify this man, no.

Q How many men did you see in the store altogether?

A There were three.

Q All right. And what did you see, if anything, happen to your father?

A Well, he was shot by the man by the swinging door.

Q Do you know that man's name?

A That is Zachary Morgan.

Q Now, did there come a time that you saw your father removed from the store after he was shot?

A Yes.

Q How was he removed from the store, if you know?

A Well, I know that an ambulance came.

Q Yes? And at the time the ambulance came, was your father still alive?

A I don't believe so, no.

MR.SCHMIER: All right. Your witness.

MR. LOMBARDO: No questions, your Honor.

MR.SCHMIER: All right.

P A T R O L M A N T H O M A S M O O R E, Shield Number 15637, 67th Precinct, called as a witness on behalf of the People, having first been duly sworn, testified as follows;

DIRECT-EXAMINATION

BY MR. SCHMIER:

Q Patrolman Moore, in response to your police duties, were you directed, as a police officer, to the scene of a hold-up and killing at 1555 Nostrand Avenue, Borough of Brooklyn, at or about 6:30 P.M. on July 30, 1970?

A I was.

Q When you got there, tell us what you saw with your own eyes?

A Upon entering the store, I found the body of one male, white, laying in the --to the rear of the store, face up; the body was later identified as Vito Petrancosta. He had been shot in the chest.

Q Did an ambulance respond to the scene?

A They did.

Q And was the man examined at the scene?

A He was pronounced dead by attendant Moller from Kings County Hospital.

Q Did you thereafter, on July 31, 1970, pursuant to your police duties, go to Kings County Hospital?

A I did.

Q There did youmeet Dr.Wald, the medical examiner?

A Yes, I did.

Q Did he show you a body?

A He did.

Q Did you look at the face of the man whose body he was then and there showing you?

A Yes.

Q Did you recognize the body?

A I did.

Q Whose body was it?

A The body of Vito Petrancosta.

Q Was that the body of the same man you had seen lying the day before with a bullet wound in his chest and who had been declared dead in the superette at 1555 Nostrand Avenue?

A It was the same body.

Q And did you so inform Dr. Weld?

A I did.

MR.SCHMIER: Your witness.

MR.LOMBARDO: No questions.

MR.SCHMIER: Thank you very much.

(WITNESS EXCUSED)

MR.SCHMIER: Your Honor, at this time may we approach the bench?

THE COURT: YES.

(OFF RECORD DISCUSSION AT THE BENCH)

MR. SCHMIER: Your Honor, in the form of concession and discussion and stipulation with

Mr.Lombardo, it is stipulated that if Frank Petrancosta were called, he would testify that he is a brother of the deceased and that he identified the body of his brother, Vito, to Dr.Wald on July 31, 1970.

MR.LOMBARDO: So stipulated, your Honor.

THE COURT: All right.

P A T R O L M A N T H O M A S B. W A L S H, Shield 21618, 67th Precinct, called as a witness on behalf of the People, having first been duly sworn, testified as follows:

DIRECT-EXAMINATION:

BY MR. SCHMIER:

MR.LOMBARDO: Your Honor, may I approach the bench?

THE COURT: Yes.

(OFF RECORD DISCUSSION AT THE BENCH)

Q Patrolman Walsh, what precinct are you with?

A Sixty-seventh Precinct.

Q What was your tour of duty on July 30, 1970?

A July 30, 1970, I was working 4 o'clock to midnight in the 67th Precinct.

Q Did you have a partner at that time?

A Yes, I did.

Q What was his name?

A Patrolman Donald Scannapieco.

Q And at or about 6:30 P.M., do you recall where you were?

A Yes, sir.

Q Where were you?

A I was on East 29th Street, between Albemarle Road and Tilden Avenue.

Q And did something at that time attract your attention in line with your duties as a police officer?

A Yes, sir.

Q What was that?

A I heard what sounded to me to be pistol shots.

Q Now, getting back when you and your partner went on duty, Patrolman Scannapieco, what type of duty did you go on, foot patrol, motor patrol or what?

A Radio car patrol.

Q And at that time when you heard the shots, where were you with respect to your patrol car?

A I was outside of the car, standing on the sidewalk on East 29th Street.

Q Tell us now, in your own words, what did you do after you heard the shots?

A When I heard the shots, they sounded to me to come from the vicinity of Nostrand Avenue and Albemarle Road.

Q What were the lighting conditions at the time?

A It was daylight. I began to walk from where I had been standing toward Albemarle Road. I could see that Patrolman Scannapieco had gotten out of the radio car and he, too, was walking toward Albemarle Road. I was on the sidewalk and he was in the street. As we approached Albemarle Road --

THE COURT: (Int'g) Just a moment. The defendant will remove his hand from his face.

Go ahead.

A As we approached Albemarle Road, I observed three male Negroes, young men running off Albemarle Road into 29th Street.

THE COURT: How many?

THE WITNESS: Three, sir. Toward a parked vehicle which was occupied.

Q How far were you from the parked automobile at that time?

A Approximately 30 feet; 20, 30 feet.

Q Go ahead, officer.

A There was another male Negroe seated in the automobile. As the three approached the car, or turned the corner, I could see that two of them was carrying guns.

Q As a result of your participation in this case, do

you know the names of the two people who were carrying guns?

A Yes, sir.

Q Who were carrying guns?

A One man's name was Zachary Morgan, and the other one was Robert Rickenbacker.

Q Do you see Robert Rickenbacker in this courtroom?

A I do, sir.

Q Will you please point him out?

A He's seated right there.

Q All right. Do you know the name of the third man who was running?

A Yes, sir.

Q What is his name?

A David Ferguson.

Q And do you now know the name of the man who was seated in the car?

A Yes, sir.

Q What was his name?

A Curtis Austin.

Q Officer, now that you've identified them as follows, would you be kind enough in your relation of the incident, to mention everybody by name?

A Yes, sir.

Q Thank you.

A The three who were running, Morgan, Ferguson and Rickenbacker, ran towards this parked automobile that was occupied by Austin. Morgan ran toward the passenger side of the car and got into the rear seat. Rickenbacker and Ferguson approached the street side door and suddenly stopped and turned and ran back to Albemarle Road, back into the street. They ran --

Q (Int'g) Now, at the time that they turned, in what direction were they facing as far as you are concerned?

A They approached facing me and then they turned and they were back to me.

Q When they approached facing you, what parts of their body did you see?

A I could see there entire bodies.

Q Could you see their face?

A Yes, sir.

Q Did you see Ferguson's face?

A I did.

Q Did you see Rickenbacker's face?

A I did.

Q Go ahead.

A They turned and they ran back to Albemarle Road.

THE COURT: You say you saw this defendant's face?

THE WITNESS: Yes, sir.

THE COURT: Go ahead. It was broad daylight?

THE WITNESS: Yes, it was. The defendant Rickenbacker, and Ferguson ran back to Albemarle Road. They ran west on Albemarle Road towards Rogers Avenue.

Q What did you do when they started to run?

A I ran to the corner and observed them running and then I saw Rickenbacker throw a gun into the street between two parked automobiles.

Q How far were you from Rickenbacker wh he threw the gun?

A Thirty, 40 feet, possibly.

Q And did you still see that portion of him which you designated as his face?

A At that time, I didn't see his face, I saw the back of him.

Q Right. Go ahead.

A Rickenbacker and Ferguson ran west on Albemarle Road. Rickenbacker had thrown the gun into the street between two parked automobiles. At that time, I ran back to the radio car, which was parked on East 29th Street, and began to pursue them with the car.

Q Were you alone in the car at the time of your pursuit?

A At that time, yes.

Q All right. Now, tell us about the pursuit.

A I had called for assistance and turned into Albemarle Road, and began to pursue Rickenbacker and Ferguson. They ran to Rogers Avenue, and I was able to draw right up to them at Rogers Avenue.

Q At the time that you drawed up to them, did you see their face?

A I did, yes, sir.

Q Did you see Ferguson's face?

A I did.

Q Did you again see Rickenbacker's face?

A Yes, sir.

Q Go ahead.

A At that time I thought I would be able to apprehend them, and I was delayed by traffic on the road.

MR. LOMBARDO: Objection, your Honor, what he thought.

THE COURT: Yes. What you thought --your progress was impeded by some traffic?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

What happened after that, Patrolman Walsh?

A They were able to once again --to run further on Rogers Avenue.

Q What did you do?

A I continued in pursut.

Q You pursued with the radio car?

A Yes, sir.

Q Continue, Patrolman Walsh.

A They ran north on Rogers Avenue, to Snyder Avenue.

Q Yes?

A And there they entered an A & P Supermarket.

THE COURT: North on Rogers to Snyder?

THE WITNESS: Yes, sir, north on Rogers.

Q Now, officer, when you saw the defendant's face, Rickenbacker, as you pulled up there, now between that time and the time that you tell us they ran into an A & P, is it?

A Yes, sir.

Q Did you, at any time thereafter, see his face again?

A He looked back while he was running on Rogers Avenue?

THE COURT: This defendant?

THE WITNESS: Yes, sir.

Q When he looked back, did he look in your direction?

A He looked in my direction, yes, sir.

Q When he looked back, could you see his face?

A I could see him, yes, sir.

Q What happened after that when they ran in?

A Ferguson and Rickenbacker both ran into an A & P Supermarket. I drew up behind them and stopped my car on Snyder and Rogers Avenue and went into the store right behind them. They ran across the front of the store to the rear exit of the store that opens into a parking lot.

Q At any time did either one of the two look back while they were running?

A Yes, sir.

Q Who looked back?

A They both did.

Q Did you again see their face?

A Yes, sir.

Q Continue, officer.

A They both ran out the back door of the A & P store to the parking lot and at that particular time they separated. The defendant Rickenbacker ran across the parking lot toward a fence line. Ferguson doubled back on Snyder Avenue and ran back towards Rogers. I was able to keep Ferguson in view at this time. So, I continued to pursue him.

Q All right. Now, since you pursued Ferguson, did there come a time that you apprehended Ferguson?

A Yes, sir.

Q In the meantime, Rickenbacker got away?

A Yes, sir.

Q Now, did there ever come a time that you went back to the vicinity where you had seen or told us you saw Rickenbacker throw a gun?

A Yes, sir.

Q How soon after you apprehended Ferguson did you go back to him?

A Immediately

Q And what, if anything, did you find?

A I took Ferguson in my car and I drove back to Albemarle Road and East 29th Street, and I stopped between the two parked autos where I had seen Rickenbacker throw a gun, and I got out of the car and I walked directly to a gun that was laying in the street.

Q I show you this gun and ask you if you recognize this gun?

A Well this, Mr. D.A. --

MR. LOMBARDO: (Int'g) Your Honor, I submit this calls for a yes or no answer.

THE COURT: Yes. Do you recognize it?

THE WITNESS: This is not the gun that Rickenbacker was carrying. That's not the one.

MR. SCHMIER: Your Honor, at this time I wish to apologize for having shown the officer a gun.

THE COURT: He says that was not the gun.

MR. SCHMIER: But you appreciate what occurred. I sent out --

THE COURT: Yes.

Q Officer, I show you this gun and ask you if you recognize this gun?

A Yes, sir. This is the gun that Rickenbacker was carrying.

Q And is this the gun you picked up?

A It is.

Q Is there anything on there which causes you to immediately to be able to say that that is the gun?

A Yes, sir.

Q What is that?

A This has been marked by Patrolman Scannapieco.

Q You see the markings on there?

A It's difficult now, but it is on the side.

Q Do you recognize that as the gun?

A Yes.

Q Is that the man you were chasing?

A This is the man I was chasing.

Q Is this the man who threw the gun?

A It is.

MR. SCHMIER: Your witness.

CROSS-EXAMINATION

BY MR. LOMBARDO:

Q Officer, during the time that you say you were chasing these two men, at any time were they walking or were they always running?

A Always running.

Q So, in answer to Mr. Schmier's question, when you said it was a chase, it was, in effect, a chase, they were running and you were chasing; is that correct?

A Yes, sir.

Q And were they running, in your opinion, as fast as they could?

A They were running fast.

Q They were running fast. Did I understand you to testify that at one point you got into your car after you had seen the two men running away and turned the corner to chase them; is that correct?

A Yes, sir.

Q Now, did you turn a corner more than once while you were chasing them?

A Yes.

Q How many times?

A In total possibly five times.

Q All right. Could you tell me, sir, how much time elapsed from the time you first saw the three defendants until the time that you apprehended the one defendant you have told us about?

A From the intitial time I saw them until I apprehended Ferguson?

Q Yes, sir.

A Three or four minutes, possibly.

Q That would be your best estimate; is that correct?

A Yes, approximately I would have to say.

MR. LOMBARDO: No further questions.

P A T R O L M A N D O N A L D S C A N N A P I E C O, Shield Number 26579, 69th Precinct, called as a witness on behalf of the People, having first been duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. SCHMIER:

Q Patrolman Scannapieco, on July 30, 1970, you were in radio motor patrol as a partner to Patrolman Walsh who just testified here, were you not?

A Yes, sir.

Q And at about 6:30, did something alert you to some emergency?

A Yes, sir.

Q What was that?

A I heard two shots go off.

Q Where were you specifically at that time?

A On East 29th, sir.

Q And with resppct to the radio car, were you in or out of the car?

A Inside at the time, sir.

Q What did you do after you heard those two shots?

A I immediately alighted from the radio car and started to walk.

Q Now, in your own words, tell us what happened after that?

A I got out of the radio car and proceeded to walk north on East 29th Street. I got about 25 to 30 feet from the corner of Albemarle and East 29th when I seen three men running from the direction of Nostrand and Albemarle Road, west, towards East 29th Street.

Q Were you able to see the faces of those three men?

A Yes, sir.

Q And do you now know who they were?

A Yes, sir.

Q Who are they?

A David Ferguson, Robert Rickenbacker and Morgan.

THE COURT: Officer Scannapieco, let me get the geographic area fixed in my mind. Perhaps this might help the jury. You were on East 29th Street; is that correct?

THE WITNESS: Yes, sir.

THE COURT: East 29th Street runs north and south?

THE WITNESS: That's correct, sir.

THE COURT: Now, one block from East 29th Street on the east of East 29th Street --or on the west of East 29th Street is Nostrand Avenue; is that correct?

THE WITNESS: To the east is Nostrand Avenue.

THE COURT: Yes, that's right. The numbers run down towards Ocean Avenue, isn't that right?

THE WITNESS: Well, the numbers do run --

THE COURT: (Int'g) Well, going on Nostrand -- Nostrand Avenue is equivalent to 30th Street, isn't it, sir?

THE WITNESS: Correct, sir.

THE COURT: Twenty-ninth Street is one block from Nostrand Avenue?

THE WITNESS: Yes, sir.

THE COURT: In other words, going from Nostrand Avenue towards Ocean Avenue or Ocean Parkway, the first

corner you come to is 29th Street?

THE WITNESS: That's right.

THE COURT: After that 28th, 27th, 26th and so on and so forth; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Now, you were in this block on 29th Street about 30 feet from the corner of Albemarle?

THE WITNESS: Yes, sir.

THE COURT: Now, Albemarle runs east and west, doesn't it?

THE WITNESS: Yes, sir.

THE COURT: Now, when you got to the corner or when you approached the corner of 29th and Albemarle, was it at that point that you saw the three men?

THE WITNESS: Yes, sir.

THE COURT: Were they at the corner?

THE WITNESS: They were just coming to the corner, running, sir.

THE COURT: Running in which direction?

THE WITNESS: They were running west on Albemarle.

THE COURT: That is going towards Bedford Avenue, towards Ocean Avenue; is that correct?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead, Mr. Schmier.

Q Now, you say you saw the faces of the three men?

A Yes, sir.

Q Were they running in your direction?

A Yes, sir.

Q Now, you said one was Zachary Morgan and one was David Ferguson, and the third Robert Rickenbacker?

A Yes, sir.

Q Do you see Robert Rickenbacker in this court?

A Yes, sir.

Q Point him out, please?

A Right there, sir.

THE COURT: Indicating the defendant.

Q What did you see the three men do after you saw the three men running? Did you see any guns?

A I seen two guns, sir.

Q Where were those guns located at the time you saw them?

A One was in Robert Rickenbacker's hand and one was in Zachary Morgan's hand.

Q Tell us what happened after that, officer?

A The three men ran directly up to a parked vehicle.

Q Could you see them at that time?

A Yes, sir.

Q Could you see what they were doing?

A They were trying to get into the vehicle that was

parked at that location.

Q Did anybody of the three succeed in getting in?

A One, sir.

Q Who was that?

A Zachary Morgan.

Q What did yousee the other two do?

A The other two stopped at the door, turned toward me and then turned and ran back towards 29th --back towards Albemarle.

THE COURT: Who were the other men who turned towards you?

THE WITNESS: Robert Rickenbacker and David Ferguson, sir.

Q And when they turned towards you, do you mean they were facing in your direction?

A Directly towards me, sir.

Q Could you see their faces?

A Yes, sir.

Q How far away were you from them when they turned towards you?

A Approximately 20 feet.

Q What happened? What did you see happen after that?

A The two men in question ran from me.

Q Yes?

A And Zachary Morgan entered the vehicle.

Q All right. Officer, isn't it a fact or isn't it a fact that you proceeded in your police duty to take care of the two men in the vehicle and your -- Patrolman Walsh chased the other two men?

A That's correct, sir.

Q Did there come a time that you saw David Ferguson again after the chase?

A Yes, sir.

Q Where was he?

A He was brought back to the scene by Patrolman Walsh.

Q I show you this gun --

MR. SCHMIER: Your Honor, I'm not so sure that I had offered it as People's exhibit.

THE COURT: You had not.

MR. SCHMIER: All right then I'll do it now.

Q Officer, I ask you if you recognize this gun?

A Yes, sir.

Q How do you come to recognize it, is there anything on there with a distinguishing characteristic?

A I have my initials on there.

Q Where did you get that gun?

A Where did I get this?

Q Yes.

A From Patrolman Walsh.

Q Was that at the time he came back with Ferguson?

A Yes, sir.

MR. SCHMIER: I now offer it as People's Exhibit 1 in Evidence against the defendant Rickenbacker.

MR. LOMBARDO: No objection.

THE COURT: All right. It will be received in evidence and marked People's Exhibit 1 in Evidence.

(GUN RECEIVED AND MARKED PEOPLE'S EXHIBIT 1 IN EVIDENCE)

MR. SCHMIER: Your witness.

CROSS-EXAMINATION

BY MR. LOMBARDO:

Q Officer, these three men that you say you first saw running in your direction, were they all the same color?

A Color, sir?

Q Yes, were they all black?

A All male Negroes.

Q All male Negroes. When you first saw them, were they running in your direction?

A Yes, sir.

Q And then the other two turned and ran back away from you, is that your testimony?

A which other two, sir?

Q The two that did not get into the car.

A Yes, sir, they turned.

Q They turned and ran; is that correct?

A Yes, sir.

Q And your partner then gave chase?

A Correct, sir.

MR. LOMBARDO: No further questions.

MR. SCHMIER: Thank you.

(WITNESS EXCUSED)

D E T E C T I V E R O B E R T M A R S H A L L,

Shield Number 1017, 67th Squad, called as a witness on behalf of the People, having first been duly sworn, testified as follows:

DIRECT-EXAMINATION

BY MR. SCHMIER:

Q Detective Marshall, how long have you been a member of the Police Department of the City of New York, and of those years how many have you devoted to being a detective?

A I've been a member of the Police Department for 10 years, and for the past five years I've been working as a detective.

Q And on July 30, 1970, were you on duty and in the vernacular of the Police Department, did you catch this case?

A Yes, I did

Q In other words, so that the jury will understand, Detective, is it not a fact that in the Police Department the detective on duty at the time of an alleged crime catches the case and he is in charge of the investigation?

A Yes, sir.

Q And you caught this case of an alleged robbery and murder which had taken place at 1555 Nostrand Avenue, a superette?

A Yes, sir.

Q How soon after that did you get to the superette?

A Within two minutes.

Q And just answer yes or no, did you see the body of Vito Petrancosta?

A Yes.

Q Officer, did there come a time that evening that you had conversations with David Ferguson?

A Yes, sir.

Q Did you have conversation --don't tell us what was said --did you have conversations with Zachary Morgan?

A Yes.

Q Did you have any conversations with Curtis Austin?

A Yes, sir.

Q Did there come a time that you sought to speak to

the defendant Robert Rickenbacker?

A Yes.

MR.LOMBARDO: Objection,your Honor, and I move to withdraw a juror.

THE COURT: The question is, "Did there come a time when you sought." Well, when you wanted to speak; is that correct?

MR. SCHMIER: Yes.

THE COURT: Sustain the objection on the ground that it calls for a conclusion of the witness or the thinking of the witness.

MR. SCHMIER: All right. I'm sorry.

Q That you wanted to speak to Robert Rickenbacker?

A Yes.

THE COURT: No, I sustained the objection.

MR. SCHMIER: Well then I'll rephrase it.

THE COURT: Yes.

Q Did there come a time that evening that you wanted to speak to Robert Rickenbacker?

A Yes.

MR. LOMBARDO: Objection, your Honor.

THE COURT: The objection is sustained, Mr. District Attorney, because the answer or the question necessarily calls for the witness' thinking or his wishes or his desires. The jury has a right

to hear from the witness what he did.

Q All right. Tell us what you did with respect to this defendant, Robert Rickenbacker?

MR. LOMBARDO: Objection, your Honor.

THE COURT: Objection overruled.

MR. LOMBARDO: May I at this time move to withdraw a juror?

THE COURT: Yes, you may, and the motion is denied.

MR. LOMBARDO: Respectfully except, your Honor.

MR. SCHMIER: Judge, may I add this appendant to my question, and when and where was this?

THE COURT: What was the question originally?

MR. SCHMIER: The question was, "Tell us what you did with respect to Robert Rickenbacker, and when and where?"

Mr. LOMBARDO: Objection, your Honor, to three questions being asked.

THE COURT: I'll sustain the objection. I'll permit the witness to answer the question. What did you do that night or shortly after 6:30 of July 30th or whatever time you fix?

MR. SCHMIER: All right.

A At approximately midnight of July 30th.

THE COURT: Your objection is overruled.

A Of July 30th . Myself together with several other detectives responded to 63 Decatur Street, in Brooklyn.

Q Do not tell us of any conversations, but did you speak to certain people there?

A Yes.

Q Who did you speak to, if anybody?

A I talked to a gentleman who identified himself to me as --

MR. LOMBARDO: (Int'g) Objection, your Honor.

THE COURT: The objection is sustained. This was Decatur Street?

THE WITNESS: Decatur Street.

Q Did you get the man's name?

MR. LOMBARDO: Objection.

THE COURT: You spoke to someone? Who was it you spoke to? Your objection is overruled.

THE WITNESS: A gentleman who identified himself to me as Thomas Rickenbacker.

MR. LOMBARDO: I must object to that.

THE COURT: Did you know him to be Thomas Rickenbacker?

THE WITNESS: It was the first time I ever met him.

THE COURT: Do you know him now to be Thomas Rickenbacker?

THE WITNESS: No, your Honor.

THE COURT: I'll sustain the objection. Just disregard what you heard on this, that as to the name of the person with whom the police officer spoke to at 63 Decatur Avenue.

THE WITNESS: Decatur Street, your Honor. I'm sorry.

THE COURT: Decatur Street.

Q What else did you do with respect to Robert Rickenbacker that evening?

MR. LOMBARDO: Objection.

THE COURT: Objection is overruled.

THE WITNESS: I conducted a room to room search.

MR. LOMBARDO: Your Honor, just so I don't interrupt the Court --

THE COURT: (Int'g) You may have a continuing objection and exception. You made a room by room search?

THE WITNESS: Of the building.

THE COURT: What kind of a building is 63 Decatur Street?

THE WITNESS: It is a rooming house.

THE COURT: Go ahead.

Q Did you see Robert Rickenbacker?

A No, I didn't.

Q Either before or after the search?

A No, I didn't.

Q Thereafter, did you do anything else with respect to Robert Rickenbacker?

A I responded to a bar and grill known as the Clifton Corners, on Clifton Place.

THE COURT: When was that?

THE WITNESS: Soon after we left the premises at 63 Decatur Street.

Q Was that with respect to Robert Rickenbacker?

A Yes, sir, it is.

THE COURT: You went to a bar and grill known as what?

THE WITNESS: Clifton Corners.

THE COURT: Where is that?

THE WITNESS: Clifton Place and Nostrand Avenue.

THE COURT: All right.

THE WITNESS: And I conducted a --

Q (Int'g) Did you speak to certain people at the bar and grill?

A Yes, sir.

Q Just answer yes or no.

A Yes.

Q Thereafter what else did you do with respect to Robert Rickenbacker?

A I responded to 58 Palmetto Street, the Bushwick

Garage.

THE COURT: When you say you responded to, you mean you went there?

THE WITNESS: I went there, your Honor.

Q You went to a garage?

A Yes, at 58 Palmetto Street.

Q Did you speak to certain people there?

A Yes, I did.

Q Did you see Rickenbacker?

A No.

Q At that place or after that?

A No, I didn't see Robert Rickenbacker there, no.

Q Thereafter, did you go any other place?

A Yes, I went to --

MR. LOMBARDO: (Int'g) Your Honor, just so that -- I am objecting and I am continuing to object to every one of these questions.

THE COURT: Yes. Overruled. It is no secret at this time that the District Attorney is making an effort to prove flight. I shall charge the jury on the subject of flight as it pertains to this case, and particularly as that concept of the law is affected by the testimony which is now being given.

MR. LOMBARDO: I'll leave that --

THE COURT: (Int'g) The jury will be given full instructions.

MR. LOMBARDO: I'll leave that --

THE COURT: (Int'g) Is this your purpose in this examination?

MR. SCHMIER: One hundred percent, your Honor.

THE COURT: All right. Go ahead.

Q Now, did you speak --don't tell us what you said -- but did you speak to other people with reference to Robert Rickenbacker?

A Yes, I did.

Q Who were those people, if you know, if you know who they are?

A I talked to --

MR. LOMBARDO: (Int'g) Objection, your Honor.

THE COURT: Objection overruled. Don't tell us what was said. Just tell us --

A (Int'g) At 352 Hancock Street, in Brooklyn, I talked to James Rickenbacker.

THE COURT: 352 Hancock Street?

THE WITNESS: Yes, sir.

Q Do you know,if you do answer yes or no, do youknow his relationship, if any, to the defendant Rickenbacker?

A Yes, sir.

Q You know that to be a fact?

A Well, he told me.

MR. LOMBARDO: Objection, your Honor.

THE COURT: No, the objection is sustained. Strike out "He told me."

MR. LOMBARDO: Your Honor, may I also respectfully ask that his other testimony be stricken as to the relationship as to the name of the man;he is predicating it upon what a person told him.

THE COURT: He has given no names and he has given no relationship because I sustained your objection, Mr. Lombardo, and I struck certain testimony from the record.

MR. LOMBARDO: Two questions ago, your Honor, two questions ago.

THE COURT: The only name I heard mentioned was the last one.

MR. LOMBARDO: That's correct.

THE COURT: And I sustained your objection. Well, the witness, without objection, said he spoke to a Mr. James Rickenbacker. Then the District Attorney asked if he knew of the relationship, and he said "He told me".

MR. LOMBARDO: Exactly, and that's the basis of my objection.

THE COURT: Strike that out.

MR. LOMBARDO: And I also move to strike out his prior answer.

THE COURT: The name is James Rickenbacker.

MR. LOMBARDO: And the relationship.

THE COURT: I've already stricken that out.

MR. LOMBARDO: That is the purpose of my objection.

THE COURT: You must disregard anything that I've stricken from the record, but so much will stand. What preceded during the last few minutes and the witness' last statement, "I also went to 352 Hancock Street and spoke with someone." You spoke with someone there; is that correct?

THE WITNESS: Yes, sir.

Q Give us other places that you went and spoke to people?

A 510 Atlantic Avenue, which is the Times Plaza Hotel.

Q You spoke to somebody there?

A I spoke to somebody there.

Q Continue on if you have any more places that youwent.

A 137-31 158th Street, in Queens.

Q You spoke to somebody there?

A Yes.

THE COURT: What was that address

THE WITNESS: 137-31 159th Street, in Queens.

I also responded to the Long Island Railroad Police Station.

Q You spoke to somebody there?

A Right.

Q All right. Now, Officer, how long did you continue --

THE COURT: Did you say "Long Island Railroad Police Station"?

THE WITNESS: That's right. That's on Atlantic and Flatbush.

THE COURT: That is the Railroad Police?

THE WITNESS: Yes, sir.

Q Officer, now, did you go in blanket form, I'm asking you, did you go to other locations?

A Yes.

Q And did you speak to other people?

A Yes.

Q And for how long a period of time from July 30th did you go to places and speak to people with respect to Robert Rickenbacker?

A For approximately one month.

Q And at any time that you went to any of these places, did you see Robert Rickenbacker?

A No.

Q How long after July 30, 1970, did you first see Robert Rickenbacker?

A March 11, 1971.

Q Just answer, where did you see him for the first time? Don't tell us anything else. Where did you see him for the first time?

A At 35 Snyder Avenue, the 67th Police Station.

MR. SCHMIER: Your witness. Oh, I'm sorry. Judge, may I be permitted?

THE COURT: Yes, go right ahead.

DIRECT-EXAMINATION (CONT'G)

BY MR. SCHMIER:

Q Did there come a time that you placed Robert Rickenbacker under arrest in connection with being an accomplice with --in connection with this murder at the superette?

A Yes.

Q At that time did you take his pedigree?

A Yes.

Q Did he give you his name?

A Yes.

Q What name did he give you?

A Robert Rickenbacker.

Q Did he give you his address?

A Yes.

Q What address did he say he lived at?

A 63 Decatur Street, in Brooklyn.

MR. SCHMIER: Your witness.

MR. LOMBARDO: Your Honor, in view of what has been elicited, I'd like to make a motion without the presence of the jury.

MR. SCHMIER: How about side bar, your Honor?

THE COURT: Would you prefer to have a lunch recess now?

MR. LOMBARDO: Whatever your Honor decides.

MR. SCHMIER: And we can take up matters of law, your Honor.

THE COURT: Well, it will perhaps give -- I want the juror who had this unfortunate experience yesterday to have as much time as he can get so that he can conduct, take care of things on the telephone. Of course, the jurors need not be kept together once we recess now. So, the juror can do anything he wants to, except, of course, and this applies to all the jurors, madam and gentlemen, you must not speak about the case. You must not talk to anyone about the case. You must not discuss the case among yourselves. You must not go to the scene or the area which has been referred to during the testimony of witnesses. You must permit no one to speak with you about the case. Should anyone speak with you about the case, please report it to the Court immediately.

It is a quarter after 12, and we can reconvene at a quarter to two.

MR. LOMBARDO: Whatever your Honor says is all right.

THE COURT: All right. And I have a few words of advice that I just gave you, madam and gentlemen. You may go to luncheon now. Please be back at 20 minutes before two. That will give you practically an hour and a half for luncheon. If you're back in the jury room at 20 minutes before two, okay, we will reconvene at a quarter to two. All right. You may step down. The witness is not excused, of course, but just for the moment, and he is subject to recall for cross-examination.

(JURORS EXCUSED)

MR. LOMBARDO: Your Honor, I respectfully move to strike out all of the testimony of Detective Marshall as to his efforts to locate, I presume, the whereabouts of the defendant on the ground that the first of all, there has been no foundation laid for it and certainly there is no connection here at all. I don't think it meets the legal requirements that your Honor, I'm certain at the

proper time, as it becomes necessary, will instruct the jury as to the elements of flight and I particularly want to call your Honor's attention to the fact that the last two answers of the police officer, that he questioned the defendant and the defendant told him he lived at 63 Decatur Street, without absolutely any testimony of the fact that the defendant had been advised of his Miranda rights.

THE COURT: Well, he was not being questioned with reference to any charge pending against him at that time. He was simply asked his name and his address for pedigree purposes. The objective sought to be obtained by the United States, by Miranda against Arizona, is the protection of indivuduals in custody who may be questioned or about to be questioned by some authoritative source, that is, a police officer or a detective in connection with matters which are important to him in the strange environment of a station house. So that a witness or a prospective defendant under those circumstances might say things which, because of the circumstances under which

he is being questioned might prompt him to say something which he wouldn't ordinarily say or refrain from saying something which he would ordinarily say. But here the subject matter of this question was wholly innocuous. It had nothing to do with any charge pending against him. He was in the station house and the question was,"What is your name? What is your name?" No, I don't think that Miranda against Arizona was ever intended to apply to this kind of a situation. As a matter of fact, Mr.Lombardo, if you take the trouble to read Miranda against Arizona, and unfortunatly most lawyers have read that case only once, if at all, that case, like the Wade case, should be read a half-dozen times before you really begin to see the meaning and the philosophy of the Court's decisions.

In Miranda against Arizona, the Court said in very plain language that --of course I'm not using that exact language--by our decision we do not intend to curtail or affect the right of police officers to go about their every day daily duties of investigation which is all part of police work. Now, the question put to the witness,

"What is your name? What is your address?" is part of the ordinary every day police work, police work which is done by police officers even on the street. When a question is directed to any individual,"What is your name? What is your address?", I don't think there is anything harmful and I think the question is entirely innocuous, And Miranda against Arizona has no connection to that type of question put to a defendant or prospective defendant.

MR. LOMBARDO: To complete the record.

THE COURT: I just ruled on your one objection which was inherent in that statment you made.

MR. LOMBARDO: Now, the thrust, your Honor, of Mr.Schmier's question was to bolster what he stated was his purpose, namely, to show flight. Now, he's showing flight by having the police officer testify that he went to a certain address; that he didn't find the defendant at that address; and then he went to other addresses and then he said that nine months later, when he questioned the defendant and asked him that address, the defendant gave the same address to which this officer has gone and not found him. I agree perfectly with everything your Honor has said, however,

your Honor and I are talking in the abstract. Mr.Schmier was not talking in the abstract. The thrust of Mr.Schmier's question was to show that this man lived at 63 Decatur, and that he lived there all along, and that he wasn't there when the police officer was looking for him and the reason he wasn't there is that he was in flight. If there was ever an inference built upon an inference, your Honor, this is it, and it is for that reason that I press my objection.

THE COURT: Your objection is overruled and your motion denied.

MR. LOMBARDO: Thank you, your Honor.

THE COURT: Did you want to say something, Mr.Schmier?

MR. SCHMIER: I just wonder if you would agree with me on this argument which I think your Honor has not laid stress on, if a defendant does not give his name and address in an ordinary crime, forgetting this one, he is not eligible for bail. The Court will not fix bail unless the defendant has, in his pedigree, identified himself to be a certain person so that it could

be checked up.

THE COURT: Nevertheless, Mr.District Attorney, personally --

MR.SCHAEFER: (Cont'g)But do you see my point? In other words, it couldn't have been intended in Miranda. Let me ask you this: Supposing we give a man his Miranda warnings and he refuses to give his name and address? Certainly --what do we do, call him John Doe?

THE COURT: Mr.District Attorney, I don't necessarily consider that argument at all and my decision stands as it is. I don't think the District Attorney or the police ought to be solicitous about the defendant's welfare with reference to bail or anything else. There is sufficient protection thrown around every person accused of the commission of a crime so that it isn't necessary for police officers to worry about the defendant being able to make bail. I'm not concerned about that at all. That is part of the every day recognized routine police activity that police officers, whether in station houses or out of station houses, may indulge themselves in the administrationof justice and in the

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enforcement of the work of the police officer. I overruled the objection and my decision is still to overrule the objection.

Any other motions you have to make at this time?

MR. LOMBARDO: Not at this time, your Honor.

THE COURT: All right. The detective, of course, will be recalled for cross-examination.

MR. SCHMIER: Your Honor, so that it should come as no surprise. Even the best of us forget. I had another one or two or three questions that I wanted to ask the officer, but in sitting down --so that when he is recalled, I will ask the Court's permission to ask one or two or three additional questions.

THE COURT: Certainly.

MR. SCHMIER: And in the interest of justice, and I will concede that I forgot to ask them.

THE COURT: You don't have to make any concessions at all, Mr. District Attorney. You've asked now before cross-examination begins or began, the witness is still on the witness stand. No questions have been asked on cross-examination

and you asked for permission to reopen your direct-examination, and ask another question or two or three. You may ask 30 if you wish to.

MR.SCHMIER: Thank you.

THE COURT: All right. A quarter to two. We'll reconvene at 1:45.

MR. SCHMIER: I have a peculiar legal argument.

THE COURT: Yes?

MR.SCHMIER: Your Honor, I gave specific instructions to the detective that in recounting the places he went to, under my order, fearing a possible mistrial, the jury not being here, I had gone to my appeals bureau and unanimously have been sustained, but I'm going to use this period to continue to research and hope that I can find a case. But I should like to let your Honor know what's bothering, because should I proffer the information, your Honor will be called upon to render a decision. I have looked up law and I have found no case at this point, your Honor. One of the places visited by the police officer in the flight-

MR. LOMBARDO: Your Honor, I must object to this going on the record.

THE COURT: He's making an offer of proof.

MR. SCHMIER: This is an offer of proof.

MR. LOMBARDO: All right. I didn't understand it that way, your Honor.

MR. SCHMIER: Yes, this is an offer of proof.

THE COURT: I assume this is an offer of proof.

MR. LOMBARDO: I'm asking your Honor for a ruling.

THE COURT: Yes.

MR. SCHMIER: One of the places gone to by the police officer was the New York State Division of Parole. Obviously when as good lawyers know, that if the defendant has been previously convicted of a crime, we cannot bring it out unless the defendant takes the stand as a matter of character, and this officer went to the defendant's parole officer and told him that when the defendant appears for parole, to report, he had been reporting every week, the parole officer who told him, because he was wanted in connection with a crime. Or that

if you wanted to allow it, I would have this officer testify, if you should allow it, that he went to ask the officer to detain Mr. Rickenbacker so that he could speak to him.

THE COURT: You mean, Mr. District Attorney, the parole officer would testify?

MR. SCHMIER: Yes.

THE COURT: If I permitted you to submit this proof --

MR. SCHMIER: (Int'g) Yes.

THE COURT: (Cont'g) --that the defendant, who had been previously convicted of a crime, had been reporting to him every week, that suddenly --

MR. SCHMIER: From the date of the crime until his apprehension --and from one week prior to the crime until nine months later when he was apprehended, the defendant failed to appear, which is a separate matter between him and the parole division. I might say, your Honor, without there being no jury here, and with apologies to Mr. Lombardo, that my appeals bureau, which is our right hand, says that his failure to report is so inextricably woven into the fabric of the

People's contention of flight that this would be an exception to the general rule where the defendant's prior record, at least one particular crime with no specific reference to why he was under parole, of course, but that he was under parole supervision could be brought out.

I deliberately, notwithstanding the guidance of my appeals bureau, had hoped to get a recess some time and ask your Honor on an offer of proof, whether your Honor would permit the testimony of my next witness, the parole officer, along the lines that I said that he had the defendant under his supervision and that from July 30th until his apprehension the following March, the defendant failed to report for parole.

THE COURT: Well, Mr. District Attorney, I think I know what you have in mind, but the only inference that jurors could draw from that testimony or such testimony by one who says he is a parole officer attached to the Board of Parole of the State of New York, is that the defendant had been previously convicted of a crime. In that way, then, the prosecution could place before the jury evidence which

it could not place before the jury, except under certain circumstances that you're familiar with. I, at this point, don't believe I will permit a witness to state that he is a parole officer; that he had the defendant under supervision. The defendant was reporting to him as a parolee and that he did not appear and so on and so forth until he was placed under arrest. I think that would be prejudicial at this point. However, I think that the proper safeguards, your witness, whoever he is, might be heard to testify along certain lines that would establish or at least it would be effective to a certain extent towards establishing proof of flight.

Now, I would have to charge the jury on the subject of flight; that flight, unexplained or falsely explained may be considered by a jury if the jurors wish to so consider it as evidence of consciousness of guilt. That is a basic elementary law and please understand that what I said now as to the manner in which I will charge flight is not all inclusive. This is prompted by the offer of proof which you've just made. I might, and as I speak now, I'm toying with this idea, and I

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think it might be appropriate for the reason that it would conceivably be effective and I'm sure the District Attorney does not want to prejudice the defendant. He simply wants to prove flight.

MR. SCHMIER: Right.

THE COURT: Now, if Mr. "X" takes the witness stand and says my name is thus and so, and I live at this and this address, there should be no question put to the witness as to his vocation, or his profession. He may testify that customarily for a period of a year or two or three he did see this defendant every single week, once a week. I wouldn't even make reference to his office. And that the last time he saw the defendant was on a certain date and after that date, for a period of nine months or 10 months, whatever the case might be, he did not see the defendant at all. Now, I might permit that.

MR. SCHMIER: Well, would you do this, your Honor --

THE COURT: Of course with advice to the defendant's counsel not to, in cross-examination, to ask the witness what his occupation is.

MR.LOMBARDO: I wouldn't have to.

THE COURT: Well, you shouldn't.

MR.LOMBARDO: I wouldn't have to. Based upon what your Honor has just said, I think the jury would have to be deaf, dumb and blind not to get the picture.

THE COURT: They don't have to get the picture at all.

MR. LOMBARDO: All right.

THE COURT: If a witness says that it was his custom to see this defendant once a week. Period. Now, he might be an insurance salesman. He might be collecting premiums on a policy. He might be seeing the subject, that is, the defendant for one of a dozen reasons. I don't see how a jury could naturally come to the conclusion that the defendant had been previously convicted of a crime and was a parolee, and under the supervision of this witness unless you, yourself bring it out in cross-examination and that is why I say I would give these precautionary instructions, if you want to violate them --I don't know yet what I'm going to do. But if you wanted to violate

them, you might, by asking the witness what his business was, and what the subject matter of the visit itself was. I can caution you for the defendant's, for the protection of the defendant, not to ask such questions if I do permit the District Attorney to embark upon the kind of examination which has just been referred to.

MR. LOMBARDO: Your Honor, may I point this out to the Court. Your Honor may not be familiar with this fact. There was a first trial and not a single word of evidence or testimony with reference to flight was offered against this defendant.

THE COURT: Well, that doesn't mean that such evidence is unlawful.

MR. LOMBARDO: I don't say that.

THE COURT: Or that this is improper.

MR. LOMBARDO: But the whole shift of strategy now to show flight.

THE COURT: That is the District Attorney's right.

MR.LOMBARDO: Of course he has a right.

THE COURT: I'm sure,Mr.Lombardo, you won't

be heard to say that only the defendant is entitled to change strategy.

MR. LOMBARDO: This defendant, your Honor.

THE COURT: Or any defendant in a criminal case.

MR. LOMBARDO: No.

THE COURT: The District Attorney also has a right to change his strategy. Maybe he just became aware in his investigation of the ramifications of this question of flight. I don't know, and the details I don't know.

MR. LOMBARDO: Well now, your Honor understands--perhaps will understand why I had originally asked for a pre-trial hearing in this case. Because now there is a complete--

THE COURT: (Int'g) Mr. Lombardo, the question of flight naturally, by the very nature of the claimed flight, has nothing whatever to do with a preliminary hearing as to voluntariness or pursuant to the United States against Wade

MR. LOMBARDO: Based upon what this detective has testified to, the fact that when he questioned and he asked him where he lived, and the defendant said at 63 Decatur Street. Now, your Honor, that may be the very admission which may lead this jury

to believe that there was flight in the case and this is a piece of evidence; and the purpose of Miranda was to safeguard the defense --

THE COURT: (Int'g) No.

MR. LOMBARDO: May I be heard, your Honor? I have a right to my opinion.

THE COURT: Go right ahead.

MR. LOMBARDO: Miranda was meant for just situations like this so that when the defendant made any kind of a disclosure to his detriment, it would be done knowingly, willingly and with full realization of the consequences.

THE COURT: Not with the full realization of the consequences. You're reading something into the decision in Miranda v. Arizona, which is not there.

MR. LOMBARDO: All right, your Honor. But, I must, your Honor, make my exception known to any testimony by any person who is going to take the stand and say that he saw this fellow once a week and then didn't see him any more. The jury is certainly going to infer or ask why did he see him once a week. What kind of a relationship is this? I don't know what the color of the probation officer is. He might be a white man. Why would a white man be sitting down with a black man? He might be a black man. I don't know

who he is, but I don't think we should inject extraneous issues into this case and have this case drag on forever.

THE COURT: Nothing should be presented during any trial which would be prejudicial to a defendant. There are a great many situations, Mr. Lombardo, where the law does sanction the presentation of matter to a jury which would be prejudicial, and which would undoubtedly be prejudicial as, for instance, the exceptions to the rule in the Molino case. There are certain instances which permit or certain situations which permit the District Attorney to offer into evidence as part of his direct case the circumstances involving the commission of some other crime, a crime not referred to in the indictment.

MR. LOMBARDO: Correct, your Honor.

THE COURT: Now, that would be prejudicial to the defendant, but nevertheless it is permitted.

MR. LOMBARDO: Well, that is to show a specific purpose. That is to show an intent or a motive.

THE COURT: That's correct.

MR. LOMBARDO: I fully agree with your Honor, but proof isn't offered in this case to show that this defendant had committed a series of crimes.

THE COURT: But the District Attorney is

not offering any evidence to the commission of any other crimes.

MR. LOMBARDO: I'm simply responding to your Honor's--

THE COURT: (Int'g) Let me just add to what I said. In this situation the District Attorney is not offering any evidence with reference to the commission by the defendant of another crime. He is not asking this witness or I certainly will not permit him to ask the witness whether or not this defendant was one of his parolees, the defendant having been convicted of the crime of robbery or burglary or murder, or whatever it might be. Certainly not. The witness would, should I so decide, have to be extremely guarded in his answers, and the District Attorney would have to be extremely guarded as to the questions which he puts to the witness, if I permit it.

MR. SCHMIER: Your Honor, if I can add to the argument, would you permit me?

THE COURT: Yes.

MR. SCHMIER: Supposing this defendant was an avid basketball player in theory, and the director of the gymnasium saw this defendant every week on the basketball court, and I called him to testify that from July 30th until March, after having seen him

every week in the past, he no longer saw him. I'm sure that would be evidence, or the jury could think it is evidence of flight.

THE COURT: Yes.

MR. SCHMIER: Now, if I don't ask the parole officer his occupation, it is unfortunate if they speculate, and I don't think they will.

THE COURT: But, Mr. District Attorney, you have proposed this type of proof.

MR. SCHMIER: Yes.

THE COURT: And I, as a matter of fact, have been thinking out loud while responding to your offer. I may permit you to go all the way and I may not. I may not even permit you to go as far as I already said I would. I have to think about this.

MR. SCHMIER: Well, can I ask your Honor in all, in justice so that we can go about our business of lunch, would your Honor just reserve the decision?

THE COURT: Yes, I'm reserving my decision.

MR. SCHMIER: I'm not calling the parole officer because I'd hate like the dickens to take a man away from important work if your Honor should be constrained not to allow me to call him. So, if at some time today your Honor feels that I could use him --

THE COURT: (Int'g) I'll let you know.

MR. SCHMIER: You may have to do that for tomorrow.

THE COURT: Otherwise, if I should want the rest of this day for research and of course, if we conclude at 4 o'clock, which I planned to do so as to give the juror number 7, who has this trouble at his home, a little more time to straighten things out there, then I'll need the time, I think, after 4 o'clock, I don't know, to do some research on this.

MR. SCHMIER: All right. I will have him allerted that your Honor will render a decision, let's say, 9:30 tomorrow morning, and I could have him here by 10, should you allow me to use him. Would that be all right?

THE COURT: Yes.

MR. SCHMIER: In the meantime, I am assuming that up until this point your Honor has given no indication whether I am on legal grounds or not.

THE COURT: None whatever.

MR. LOMBARDO: Your Honor, may I just make this one point, as long as your Honor is going to give this the thought that I know your Honor will. I could see there would be an exception, example, if the defendant were to take the stand.

THE COURT: Oh, well of course, then this

is all academic.

MR. LOMBARDO: That's exactly my point. Then, in other words, and I'm sure the District Attorney needs absolutely no recommendation from me as to what course to follow. Then you could put anybody on to show flight.

THE COURT: No doubt about that.

MR. LOMBARDO: But we're not at that part of the trial yet, your Honor.

THE COURT: You're speaking of flight generally?

MR. LOMBARDO: No, I'm speaking of --

THE COURT: (Int'g) The District Attorney may prove flight during the direct presentation of his case.

MR. LOMBARDO: But not by showing that the man committed another crime.

THE COURT: He doesn't intend to show anything like that, and I won't let him show anything like that.

MR. LOMBARDO: Okay.

THE COURT: All right. A quarter to two.

MR. SCHMIER: Judge, would I be imposing upon you if I, as an individual, I put the question to Judge Starkey, for his thinking?

THE COURT: Mr.Schmier, you can question any of these brilliant judges, and they're all very brilliant here. All right. We'll recess now. It is 12:45. Until 1:45 P.M.

(LUNCH RECESS)

(AT 1:55 P.M. THE FOLLOWING OCCURRED)

THE COURT: Please send for the jurors.

THE CLERK: Jurors all present. Defendant present with counsel. District Attorney present.

THE COURT: All right. Gentlemen, are you ready? Mr.Schmier?

MR. SCHMIER: Yes, your Honor.

MR. LOMBARDO: Of course, your Honor.

THE CLERK: Detective Robert Marshall resumes the stand. Advised that he is still under oath.

DIRECT-EXAMINATION (CONT'G)

BY MR. SCHMIER:

Q Detective Marshall, when you placed the defendant under arrest, in the normal course of your procedure did you fill out the arrest cards?

MR. LOMBARDO: Object to the form of the question, your Honor.

THE COURT: Objection overruled.

MR. LOMBARDO: Respectfully except.

Q Answer?

A Yes.

Q These are blue cards which are made out in every arrest, are they not?

MR. LOMBARDO: Objection, your Honor. I will object to the D.A. testifying.

THE COURT: Objection overruled.

Q These are blue cards which are made out in every arrest, called the arrest cards?

A Well, it is either a blue card or a white card, depending on whether there is property or not.

Q But that is known in the department as the arrest card?

A Yes, it is.

Q And that contains certain information, but more particularly the defendant's name and address?

A Yes.

Q Is that card kept in the regular course of business?

A It is kept on file in the precinct of arrest.

Q And did you make out those cards?

A Yes, I did.

Q Are they presently on file with the Police Department?

A Yes, they are.

MR. SCHMIER: I ask Mr. Lombardo to stipulate that if the cards were brought here they would show that the defendant's arrest card reads Robert

Rickenbacker --

THE COURT: (Int'g) The card is not in evidence at this time.

MR. SCHMIER: No, excepting that I think --

THE COURT: (Int'g) Well, isn't the best evidence, Mr. District Attorney, testimony of the police officer? Let me ask. Who wrote the arrest card?

THE WITNESS: I typed them out, your Honor.

THE COURT: Well, this was the result of information which was given to you by the defendant.

THE WITNESS: Yes, your Honor.

THE COURT: I don't believe the arrest card is necessary. This witness has already testified to a conversation he had with this defendant during which the defendant gave him his name and address.

MR. SCHMIER: I appreciate that, your Honor, but I was sort of guilding the lily, if I can be accused of something. I wanted to have a regular record of the Police Department. But I withdraw that request.

Q Now, officer, getting back to our testimony to this point, after the crime, you told us that evening, about 12 midnight, you went to 63 Decatur Street in the borough of Brooklyn?

A Yes, sir.

Q And you also told us that you spoke to certain people?

A Yes, sir.

Q Just answer yes or no, did you receive certain information?

MR. LOMBARDO: Objection, your Honor.

THE COURT: Objection is overruled.

A Yes.

Q And thereafter, after receiving that information, what, if anything, did you do?

A I proceeded to other locations.

Q What location did you proceed to?

MR. LOMBARDO: Just not to encumber the record, may I have a continuing objection, your Honor, to this line of questioning?

THE COURT: Yes.

Q What location?

A My next location was 352 Hancock Street.

THE COURT: Wasn't this all gone over before, Mr. District Attorney?

MR. SCHMIER: Except this, your Honor --

MR. LOMBARDO: (Int'g) Your Honor, I'm going to object to the District Attorney testifying.

MR. SCHMIER: Well, the Judge asked me a question.

THE COURT: Is it your purpose now to elicit

something which was not elicited during the direct-examination with reference to those calls he made at certain addresses?

MR. SCHMIER: Yes. My purpose is now to show that every address he went to, he had received information at a prior address.

THE COURT: Go ahead.

MR. SCHMIER: That is the little difference between this morning and now.

THE COURT: All right. Go ahead.

Q Now, at this second address that you just gave us, what was it again?

A 325 Hancock Street.

Q You told us this morning, that you spoke to somebody there?

A Yes, sir.

Q At that address, did you receive certain information?

A Yes, I did.

Q What did you do after receiving that information?

A I went to 58 Palmetto Street.

Q You told us this morning that you spoke to some person or persons there?

A Yes, I did.

Q Did you receive information?

A Yes.

Q What did you do after that?

A I proceeded to 137-31 159th Street, in Queens.

Q You told us you spoke to somebody there?

A Yes.

Q Did you receive some information?

A Yes.

MR. LOMBARDO: Your Honor, I must object to the characterization of information, information, information.

THE COURT: Did you talk with someone?

THE WITNESS: Yes, I did.

THE COURT: After you talked with someone, what did you do?

THE WITNESS: I went to other locations.

Q What location did you go to?

A After I left Queens, I went back to the area of Flatbush Avenue and Atlantic Avenue.

Q And what, if anything, did you do there?

THE COURT: Was that the hotel?

THE WITNESS: That's the hotel and the railroad station, the Long Island Railroad.

THE COURT: What do they call that hotel?

THE WITNESS: The Times Plaza.

Q Yes or no, did you speak to anybody there?

A Yes, I did.

Q And after speaking to that person or persons, what did you do?

A I proceeded to conduct an investigation in the area.

MR. LOMBARDO: Objection.

THE COURT: Yes, the objection is sustained.

Q Getting back to 63 Decatur Street, you told us you visited there at midnight of the crime?

A Yes.

Q When was the next time, if any time, that you went back, if you did?

A The next day.

Q What time did you go there?

A Approximately eight or nine o'clock at night.

Q And how long, if you can recall, did you remain at the premises?

A I parked in my vehicle.

MR. LOMBARDO: Objection, your Honor.

THE COURT: No, how long did you remain in the premises?

THE WITNESS: I didn't enter the premises.

Q What, if anything --where were you with respect to 63 Decatur Street?

A About 40 feet away.

Q And did you have 63 Decatur Street under surveillance?

A Yes, I did.

Q How long did you keep it under your surveillance?

A Until daybreak of the next day.

Q What would you call daybreak?

A Six in the morning; 5:30, 6 o'clock.

Q Now, how many times, as best as you could estimate, did you have--did you visit 63 Decatur Street in the next period of time?

MR. LOMBARDO: Objection, your Honor.

THE COURT: Objection is overruled.

A About a dozen.

Q And how many times did you have the premises under surveillance?

A About a dozen times.

Q And what hours would you have surveillance, if you can recall?

A Mostly in the night time hours.

Q From when to when?

A Any time between 8 o'clock and midnight until six or seven the next morning.

Q And at any time did you see the defendant?

A No, I didn't.

Q Now, these other addresses that you gave, at any time did you see Rickenbacker there?

A No, I didn't.

Q Did you ever have occasion to go back and revisit those premises?

A A couple of times.

Q And at any time did you keep those premises under surveillance?

A Yes, I did.

Q And at any time did you see the defendant?

A No.

MR. SCHMIER: Your witness.

CROSS-EXAMINATION (CONT'G)

BY MR. LOMBARDO:

Q Officer, did I understand you to say that when you first saw the defendant, you saw him at a police station?

A Yes, I did.

Q When was that?

A March 11th of this year.

Q In Brooklyn?

A Sixty-seventh Precinct in Snyder Avenue.

Q Do you know whether or not he had been arrested in Brooklyn?

A Yes, sir.

MR. LOMBARDO: No further questions.

DR. M I L T O N A. W A L D, residing at 4550 Ocean Avenue, Brooklyn, New York, called as a witness on behalf of the People, having first been duly sworn,

testified as follows:

DIRECT-EXAMINATION

BY MR. SCHMIER:

Q Dr.Wald, you are attached to the Medical Examiner's office?

A Yes, sir.

Q And how long have you been so attached?

A Fifteen years.

Q Doctor, in a short sentence, would you tell us what is the function of the Medical Examiner's office?

A We investigate sudden, suspicious or unattended deaths and where the circumstances indicate, perform an autopsy to clarify the cause or manner of death.

Q Doctor, what are your qualifications as a medical physician?

MR. LOMBARDO: Your Honor, I'll concede the doctor's qualifications.

THE COURT: Well, I think the jury ought to hear what Dr.Wald has to say on that subject.

A Well, I've been licensed for about 32 years. I've been doing medical examiner investigations and autopsies for fifteen years; I'm a Board certified internist and I have had a large number of different hospital affiliations and teaching appointments.

Q Doctor, approximately how many autopsies have you

performed?

A I personally performed over 4000.

Q And how many would you say you participated in?

A Well, I've witnessed or assisted at another 15 or more thousand.

Q Doctor, as a result of your work in connection with autopsies, have you been called upon to testify in the various courts of the City of New York, the Grand Jury, the Supreme Court and others?

A Yes, sir.

Q And have you been called upon to give your medical expert testimony in those particular courts?

A Yes, sir.

Q Doctor, on July 31, 1970, were you called upon in your official duties to perform an autopsy upon one Vito Petrancosta?

A Yes.

Q At Kings County morgue?

A Yes, sir.

Q Doctor, did you perform the necessary function of having the body examined, identified to you prior to your autopsy?

A Yes, sir.

Q Do your records --are they kept in the regular course of business?

A Yes, sir.

Q And do they reflect to you who, if anybody, identified the body?

A Yes, sir.

Q Will you read them, please?

A Identified by Frank Petrancosta, brother of the deceased, of 177 Hopkins Street, Brooklyn, on July 31, 1970, to me at the Kings County morgue. He identified the body to be that of Vito Petrancosta. Also, a police office, patrolman Thomas Moore, Shield Number 16637 of the 67th Precinct also identified the body to me on the same day at the Kings County morgue.

Q Doctor, after the necessary amenities of identification had been taken care of, did you thereupon perform an autopsy?

A Yes, sir.

Q Would you be kind enough, doctor, to give us the results of that autopsy?

A Well, this subject was a 61 year-old while male, five foot five, 158 pounds. There is a bullet wound of entrance two inches to the right of the front center of the body. This is 57 inches above his heels. The wound is an entrance wound. It has a round circle surrounded by a black ring.

THE COURT: Will you show us, doctor, on

your body or on, perhaps, the body of a court officer, where that entrance wound was?

THE WITNESS: Just to the right of the front center of the body, at the level of the third rib in the front. (Indicating)

Q Doctor, would a layman refer to that as the chest?

A It is the front of the chest, yes, sir.

Q In other words, it is the front of the chest, doctor. Would you please proceed?

A The track of the bullet is from front to back, slightly downward parallel with a line through the body, that is neither right nor left, but directly backward and downward through the third rib space, through the middle of the right upper lobe of the lung and then in the back through the 6th rib, which it fractures and comes out of the back at a point 55 inches above the heels, also two inches to the right of the back midline. The front entrance was 57 inches above the heels and the back exit was 55. So, it slanted slightly downwards. The right chest space contains over 1900 cc of blood. That would be better than three pints of blood, and the intercostal artery, which is an artery between each rib, this is also torn. As a matter of fact, most of the bleeding originates from this torn artery between the

ribs. There is some blood through the bullet wound tunnel through the lung. Mainly, this autopsy shows nothing of further medical significance, and shall I state the cause of death?

Q Doctor, would you permit me now to ask you the regular legal question, as a result of your autopsy, were you able to form an expert medical opinion as to the competent producing cause of death?

A Yes, sir.

Q What is your expert opinion as to the competent producing cause of death of Vito Pentrancosta?

A Gunshot wound of the chest, lung and intercostal arteries, with massive internal hemorrhage.

MR. SCHMIER: Your witness.

MR. LOMBARDO: I have no questions of the doctor.

MR. SCHMIER: Thank you, doctor.

THE WITNESS: Thank you.

THE COURT: Next witness, please.

MR. SCHMIER: May we approach the bench, your Honor?

THE COURT: Yes.

(OFF RECORD DISCUSSION AT THE BENCH)

MR. SCHMIER: Your Honor, as a result of the colloquy at the bench, I am privileged by your Honor to make the following statement. In the absence of

the jury, a matter of law was discussed with your Honor.

THE COURT: For quite some time.

MR. SCHMIER: And your Honor indicated that you might possibly rule on it in the afternoon session. I await your ruling so as to know what my next move will be..

THE COURT: Well, Mr. District Attorney, I did say during that discussion we had, which took us close to 2 o'clock, that I was not sure that I would be able to make a decision on the matter you presented,by 2 o'clock, but that I would require some research work after 4:30, if we recessed at 4:30. I have not yet decided just what I will do. I would prefer to have time,the rest of the day on that question. In the meantime, is there any --

MR. SCHMIER: (Int'g) So as not to put Mr. Lombardo at a disadvantage, I am prepared to rest subject to your Honor's ruling, and if your Honor's ruling is otherwise, then I would proceed.

THE COURT: Well, I think that would be proper. I think that the jury can get this case, in any event,by Thursday morning, without any question.

MR. SCHMIER: Yes.

THE COURT: Isn't that so?

MR. LOMBARDO: I would think so, your Honor.

THE COURT: So that there is no undue waste of time, the matter which I have in my mind, of course, is of considerable importance to both sides, and that's why I want to give it all the time that it should be given, and no matter what my decision will be, gentlemen, I will dictate into the record what I have concluded, and the reasons for my conclusion, tomorrow morning, and then we can proceed promptly.

MR. SCHMIER: Now, Judge, this being a lay jury, I think it would be on proper ground if I would ask your Honor to advise the jury that they're not to speculate whether I call any additional witnesses or not, that it's purely a matter of law.

THE COURT: Oh, yes, yes, yes, yes. Mr. Foreman and madam and gentlemen. Let me say this. I might just as well say it now because every time I charge a jury, I let them know of what I'm about to tell you now. You see, every time a lawyer rises to his feet and says "I object" or "I move that such and such be done", what he really does is present a question of law to the Court, so that the Court might rule on it. He doesn't have to say when he objects, "I am presenting this question of law because lawyers understand." We know the reasons for the objection, and the judge presiding at a trial rules upon the objection. He

rules upon the question of law which is involved in the objection. Now, any time there is colloquy between the Court and lawyers, or either one of them, any time a lawyer addresses himself to the Judge on a question of law, or any time the Judge talks to counsel or either one of them as to a question of law, these matters are not be concerned, are not to be the concern of the jury for one single second.

Jurors must not concern themselves as to what the Judge rules as he does upon objections and motions, because all you need understand is the Judge is ruling on a question of law, on a question of evidence, on a question of procedure. You remember, I said earlier in these proceedings that the Judge has a job to do and I think that was this morning. I said it is my obligation to see that an orderly trial is maintained. By an orderly trial is meant that the lawyers are to present to the Court and the jury only such evidence which the law says they are permitted to present. And they are not to present such matters which the law says should not be presented.

Now, when the lawyer makes an objection, he addresses himself to the propriety of certain evidence which is offered. Now, this is between the Judge and the lawyers. You must not think for a moment as to

why the Judge rules as he does. I assure you, madam and gentlemen, that my rulings are made upon the law, upon rules of evidence and rules of procedure with which you are not to be concerned.

You will remember, also, that I said already today, that you are sole and the exclusive judges of the facts, of the believability of witnesses. You are to decide as well as it is reasonably possible for human beings to decide in accordance with the rules, which I shall give you, and in accordance with the rule of reasonable doubt, beyond a reasonable doubt, as I shall define it, it is for you to determine what happened on this 30th day of July, 1970. You are not to speculate as to anything wich transpires as to anything which is said between Court and counsel. If the District Attornes rests his case tomorrow, you are simply to assume that all of the evidence which the District Attorney wished to submit was submitted to the jury today. You see, and that will be the People's case, at that point, when the People say that that's the People's case,

Now, there is nothing further to present today, you say?

MR. SCHMIER: Judge, may we approach the bench?

THE COURT: Yes.

(OFF RECORD DISCUSSION AT THE BENCH)

THE COURT: Gentlemen, I don't think it is really necessary to indulge in semantics.

MR. SCHMIER: The District Attorney asks --

MR. LOMBARDO: (Int'g) Your Honor, I must object to the last part of what --may we come back to the bench?

THE COURT: No, no, I'm going to elaborate, if you want to use that word, although it is not really elaboration. I did tell the jurors that the presiding judge has a very well known, affixed and multiple obligation, and that is to see that an orderly trial is presented. A fair and an orderly trial. That does not mean, of course, that the Judge is to see that counsel don't engage in fisticuffs. Not at all. That means, as I said to you, that counsel for the People, the District Attorney, or counsel for the defendant, in cross-examining witnesses might want to inject some question, might want to propose something which they have no right to propose, and therefore, the Court will say "No, I know what you want to do but you can't do it. I won't permit you to do it." Not only that, but counsel on one side or another might wish to keep certain evidence out of the record. If I ruled that that evidence should not be presented

to a jury under the law, then it will not be presented, but if, legally, it might be presented, I will permit the attorney who wants to present it to proceed and present it to the jury.

You see, that is what I refer to when I mean to conduct a fair and an orderly trial. To be certain that you madam and gentlemen, you who sit and deliberate in this case will have before you only such evidence, only such testimony as the law says you may lawfully or legally have before you. Unlawful, illegal evidence should not be presented to you and I will not permit it to be presented.

MR. SCHMIER: Thank you.

MR. LOMBARDO: Thank you.

THE COURT: Now, you may rest tomorrow, you may rest today. I don't know. I'm holding in abeyance the matter of conclusion until I arrive at some decision with reference to your request this morning.

MR. SCHMIER: Yes, sir.

THE COURT: All right. It is unfortunate that it is only 25 minutes after two. However, I don't believe that there will be any undue waste of time, because, in any event, no matter how far we went today, we could not possibly finish this case today. We might conceivably conclude the case tomorrow. And

if we do not conclude the case by tomorrow afternoon, we'll be well on the way towards conclusion. So that in point of time, the worst that can happen is that I will charge the jury early Thursday morning. Isn't that the way you see it, Mr. Lombardo?

MR. LOMBARDO: Yes, your Honor, if all goes as we expect.

THE COURT: Speaking about time.

MR. LOMBARDO: Yes, your Honor, that seems fair.

THE COURT: All right. Mr.Foreman, madam and gentlemen of the jury. We'll part company now for the day. The admonitions which I gave you this morning, the advice which I gave you this morning does not have to be repeated. You remember what I said about not discussing the case, not permitting anyone to talk to you about the case and not listening to anything you might hear or reading anything you might see. Do not go to the area which has been referred to by any witness on the witness stand.

If you will return tomorrow morning at five minutes before 10, there is no calendar call tomorrow morning, and there is no reason why we shouldn't be able to reconvene promptly at 10 o'clock. So, have a good afternoon and a good evening, madam and gentlemen, and God willing, we'll see you tomorrow morning at 10 o'clock sharp.

Gentlemen, do you want to step forward?

(OFF RECORD DISCUSSION AT THE BENCH)

(COURT RECESSED AT 2:30 P.M.

****

(October 13, 1972.) (Outside the presence of the jury and the defendant, the following occurred at 9:30 A.M.)

THE COURT: Mr. District Attorney and Mr. Lombardo. Last night I examined the case of People v. Place, 157 N.Y., at page 485

MR. LOMBARDO: May I have that citation again, your Honor?

THE COURT: One hundred and fifty-seven, N.Y., page 584 People v. Martha Place. And here is some language which I find in the opinion of page 598. You can see that the opinion is quite lengthy. The case deals with the question of flight.

MR. SCHMIER: Excuse me, Judge, is this a Court of Appeals decision?

THE COURT: Yes. Court of Appeals, and I'm now reading from that case. "Another alleged error upon which the defendant relies for a reversal relates to the admission of evidence as to what occurred between the defendant and her husband upon his return on the day of the homicide. The contention of the defendant is that this evidence was inadmissible because it involved proof of one crime to establish the defendant's guilt of another. It is an elementary principle of law that the commission of --"let me insert parenthetically my own language --an elementary principle

of law is usually the elementary principles of law for which no authority can be found. That or very little authority can be found because it is somewhich which is taken for granted. However, to go -- "It is an elementary principle of law that the commission of one crime is not admissible in evidence upon the trial of another where the sole purpose is to show that the defendant has been guilty of other crimes, and will consequently be more liable to commit the offense charged."

Let me strike out what I said parenthetically, because that is an elementary principle of law for which a great deal of authority exists beginning with -- not beginning with the Molyneux case, but the philosophy of the Molyneux case is steep in the philosophy of our entire criminal law. I was a little anticipitory when I made that parenthetic statement. Now, to go on. "But," said the Court of Appeals,"if the evidence is material and relevant to the issue, it is not inadmissible because it tends to establish the defendant's guilt of a crime other than the one charged." And they say People v. McLoughlin, 365, at page 386, from which it would appear --well, I would hesitate to say so now because I would like to examine more closely the other crime which the defendant in this

case committed. I think that the victim of this crime, of this homicide, because the defendant was convicted by circumstantial evidence, the victim of this homicide was not the husband. That's my present recollection of the case. I haven't gone into the facts, but the case goes on to show that the prosecution was allowed to prove an assault by the defendant upon her husband when he returned home. Yes. Ida, another daughter of the husband, not of this defendant, was killed, and when the death of Ida could no longer be concealed unless he was removed or his life destroyed. In other words, in this People v. Place, the prosecution should be permitted to show the commission of another crime by the defendant upon her husband, an assault.

MR. LOMBARDO: Well, your Honor, may I talk to your Honor seated?

THE COURT: Certainly.

MR. LOMBARDO: I think, your Honor, that that might be permissible even under the Molyneux case, to show an intent or to show a motive.

MR. SCHMIER: The question in my mind --

THE COURT: (Int'g) We had a similar situation in the Louis case.

MR. SCHMIER: In my mind I don't think what you're reading would cover something which was

secondary, such as flight.

THE COURT: Well, this is not collateral. The inference drawn from flight is not, strictly speaking, a collateral matter. It is in itself a body of circumstantial evidence. It may be urged as a circumstance from which, together with other circumstances, jurors may arrive at a certain conclusion.

MR. SCHMIER: Then I followed. But the question is in showing the main crime. The fact that you showed that he did other crimes may be part of the res jesti. One may be inextricably woven into the fabric of the other. Case in Louis, where the deceased committed three homicides in two or three hours, and then in order to effectively remove the one remaining witness who could testify against him, he took the girl friend of victim number one over to New York and put a bullet into her head and left her for dead.

MR. SCHMIER: We were allowed to show that crime for which he is presently under indictment in New York and had not been tried.

THE COURT: Yes.

MR. SCHMIER: Because it was woven in.

THE COURT: Yes, I think an appellate court will sustain me in that.

MR. SCHMIER: But the question is, will flight be woven in, and I would worry about it to the point --

THE COURT: (Int'g) Mr. District Attorney, I said I would reserve decision on a matter which you offered. You're not going to present it, so it makes it academic.

MR. SCHMIER: The point is, I would,rather than have your Honor possibly sustain me, I would rather take the onus as a conscientious District Attorney and say,notwithstanding the possiblity that your Honor might sustain me, I still feel from my research of yesterday that It could lead to a reversible error.

THE COURT: Yes, you're right.

MR. SCHMIER: And rather than put your Honor in a position where you'd sustain me on a possible reversal error, I think, as a conscientious D.A., I'll stand on the case which I presented.

THE COURT: Mr. District Attorney, I couldn't possibly attribute your stand to your natural kindness. I won't do that, because I don't think that you're so kind in the prosecution of a criminal case. You believe in putting in everything you have. Everythink the law would permit you to present to a jury. If you believe, as I do, that a defendant shouldn't be given talking points. In other words, if the same purpose would be served ultimately by not venturing too far out in the pioneering expedition as to the

law and the various new answers of the law, we might just as well not do it and that's your theory.

MR. SCHMIER: Since we're talking on philosophy of trying a case, your Honor. If the decision -- Judge, I have an interesting point. If this were the only element of flight, which your Honor would permit in theory --

THE COURT: (Int'g) Yes?

MR. SCHMIER: (Cont'g) --I would stand on the chance of making new law or letting future lawyers know whether this position is tenable. But I have been sustained and I think that it is acamemic, that the nine months that he disappeared and the efforts of the officer are in there, so what we're now asking is one additional element which might convince the jury that it was flight,and I stand outside the presence of the jury and say if they don't believe there was flight now in what was proven, I'm sure the additional witness won't prove flight, and therefore, I would ask your Honor not to render a decision. I'd rather be put in the position where I withdraw my -- I did it under an offer of proof.

THE COURT: You want to withdraw your offer of proof?

MR. SCHMIER: I want to withdraw my offer of proof.

THE COURT: All right. Let the defendant come in and I'll place it on the record and there are other matters I have to take up with the Court and counsel.

Mr.Lombardo, under the new criminal procedure laws as you undoubtedly know, a judge presiding at a trial may not advise the jury with reference to the fact that the defendant has not taken the witness stand and that no unfavorable inference may be drawn therefrom or that no inference may be drawn therefrom. Ordinarily, before September 1st, I did charge the jury along those lines. However, under the new criminal procedure law --let the record indicate that the defendant is now here. Under the new criminal procedure law, I must not advise the jury to that effect unless the defendant wishes me to do so. I want you to consider that. I want you to consider further, Mr.Lombardo, whether or not you want me to charge circumstantial evidence in this case. You, too, Mr. District Attorney.

Now, first, the defendant just having arrived, let me say that I've discussed with counsel the offer of proof made by the District Attorney. I intimated at that time that I would or I am inclined to accept such proof limited very drastically so that the jury could not come to but one conclusion, and that is that the defendant had been previously convicted of a

crime. I didn't want that to enter into the record in the presence of a jury and as you know, I've called your attention and the District Attorney's attention to the case, People v. Place. However, the District Attorney now withdraws his offer of proof;is that correct?

MR. SCHMIER: That's absolutely correct, your Honor.

THE COURT: All right. Now you see, I think that we ought to continue right on once the jurors are here. I don't know, is it your purpose to rest at this point?

MR. SCHMIER: In view of the position which I was taking, the contemplated ending of my case rested on my calling a parole officer under the offer of proof. After having discussed it with my Appeals Bureau and having slept on it, and having withdrawn my offer of proof, I now, as soon as the jury will be here, will tell your Honor that I rest. The only reason I didn't rest was because I had offered proof.

THE COURT: Let me say, Mr. District Attorney, generally, as I indicated yesterday, I would rule against you on that offer of proof. As I indicated, also, yesterday, if I did accept some version, some variation or some modification of proof, I would limit it very

severe. However, I think that notwithstanding the case of People v. Place, we have a different situation here, because in the final analysis, were there only evidence or proof of flight in this case, I wouldn't submit it to a jury. If all you had here, Mr.District Attorney, was evidence of flight, standing alone.

MR. SCHMIER: Oh, I agree.

THE COURT: I would grant the motion to dismiss the indictment.

MR. SCHMIER: Oh, I agree.

THE COURT: I'll charge the jury fully on that subject, of course, but I think the question would be strictly moot and your strategy is not to present it for that reason so that should there be a conviction in the case it would stand.

MR. SCHMIER: Your Honor, so that you could be guided in the future handling of your cases and my thinking, I would like to tell you this. My Appeals Bureau felt that the magic words in my offer of proof was inextricably woven into the case, and they gave as a concrete example in theory, supposing the defendant had fired a shot at the police officer and had hit a bystander, in theory, and was under a separate indictment for the shooting of John Jones, a civilian. My office feels there is no question but that that shot

could come in --

THE COURT: (Int'g) No doubt of it --

MR. SCHMIER: (Cont'g) --because it is inextricably woven in, but the question of whether he failed to report --one of the learned men in my office said,"Supposing he didn't report because he didn't intend to report, whether he had been involved in this or not, how could you prove that his failure to report is woven into the flight? Supposing he didn't want to report because he didn't like the parole officer and decided not to go there anymore?" The Appellate courts might find it is not woven into the flight and for that reason, I think that the better position of strategy was to withdraw that.

THE COURT: Well, you will remember,Mr.District Attorney, and you will, too, Mr. Lombardo, that my initial reaction to the offer of proof was a negative one. I felt that the risk to the defendant involved in the receipt of this type of evidence would so overshadow and outweigh and outpredominate anything which it sought to prove that it would or it might be prejudicial.

MR. SCHMIER: All right, Judge.

THE COURT: You say you propose to rest?

MR. SCHMIER: Yes.

THE COURT: And the case will then be with you, Mr. Lombardo.

MR. LOMBARDO: Yes, your Honor, and it is my present intention, and I don't think it will be changed, but immediately upon the District Attorney's resting his case when the jury is in the box, I will rest my case.

THE COURT: Now, if you do rest your case, that means, therefore, that we will immediately proceed with summations.

MR. LOMBARDO: Correct, your Honor.

THE COURT: Now, under the law, I should advise counsel of what I expect to charge the jury. That is the basics or the crimes and degrees and so forth. But at the outset, I think it is Section 300 point something or other, 300 point --if anyone knows, 300.10, which provides, among other things, that where the defendant has not taken the witness stand, the Court may not --let me make sure. I want the Penal Law.

THE CLERK: Yes, Judge.

THE COURT: The Court may not charge that they may drew no inference from the fact that the defendant is refrained from taking the witness stand unless the defendant, himself, requests that charge.

THE CLERK: Do you want the Penal Law or the

Code?

THE COURT: No, the Penal Law. I'm quite sure it is the Penal Law. Section 300 --or the Code. Have you got the Code? It's never in the Penal Law.

MR. LOMBARDO: It's in the Code.

THE COURT: No, I'm sorry. The Code of Criminal Procedure. I wasn't thinking, because the Penal Law was changed three or four years ago.

MR. SCHMIER: And this has been changed from September 11th.

THE COURT: Mr. Lombardo, here it is. "Upon request of a defendant who did not testify in his own behalf but not otherwise --" it is 300.10"--but not otherwise, the Court must state that the fact that he did not testify is not a factor from which any inference unfavorable to the defendant may be drawn."

Now, I will not so advise the jury unless you request me to. Now, I'm sure, Mr. Lombardo, being the lawyer that you are, with the experience that you had, you understand the rationale of this change in the old Code of Criminal Procedure. So that it is for the defendant to say now whether he wants me to so advise the jury.

MR. LOMBARDO: Your Honor, if I may, I seem to recollect and I might be wrong, but in the

preliminary charge that you gave to the jury, I think you mentioned the fact --

THE COURT: (Int'g) No, sir.

MR. LOMBARDO: You did not?

THE COURT: No, sir, I mentioned the fact that no defendant is required to say a single word towards proving his innocence; that the burden is always upon the prosecution, and I will say that again, in an abbreviated form, of course, because the jury has already been advised to that effect. I will so again state to the jury.

MR. SCHMIER: Which is the same equivalent except that the rationale, if I could say, was that it highlights to the jury.

THE COURT: Right. It accentuates to the fact that the defendant did not take the stand.

MR. SCHMIER: And the charge of the Judge that the defendant did not have to defend himself is the equivalent of this, and the rationale was unless the defendant demands it, don't highlight it.

THE COURT: No, there is no equivalency, if I might say that, because saying that no inference is to be drawn from the fact that the defendant has not taken the witness stand accentuates the fact and reminds them that the defendant did not take the

witness stand. However, jurors must know there is no burden upon the defendant. That there the burden is upon the presecution.

MR. LOMBARDO: Your Honor, may I give that some thought? May we approach the bench?

THE COURT: Well, there is no jury here, Mr. Lombardo.

MR. LOMBARDO: The defendant, your Honor, is talking into my ear and suggesting to me that he wants to call witnesses to establish a certain element of proof which I must be candid to say to your Honor, comes as a complete surprise to me and I would appreciate it if your Honor would allow me just a few minutes to straighten this point out?

THE COURT: Talk to him. If it is proof that is relevant and pertinent to the issue, I'll give the defendant an opportunity to call them.

(RECESS)

THE COURT: The defendant has been sitting here since Friday morning, and the case was marked ready at the beginning of September. He ought to know about the witness, and now just as we're approaching the summations, he tells you that he wants a witness, and now you've been talking about this for almost a half an hour.

MR. LOMBARDO: Your Honor has been most patient.

THE COURT: I can't give up the morning for conference.

MR. LOMBARDO: May I just another moment?

THE COURT: All right.

(MR. LOMBARDO CONTINUES DISCUSSION WITH DEFENDANT)

MR. LOMBARDO: We're ready to proceed, your Honor. As I indicated earlier to your Honor on the record, we'll continue thatway.

THE COURT: All right. Call the jury, please.

(JURY CALLED INTO THE COURTROOM)

THE COURT: Mr. Lombardo, my understanding is from what has been said up to this point, the jury being on it's way into the courtroom now, that the District Attorney will announce to the jury that he has rested his case. My understanding is further, that you will announce that you have rested your case; is that correct?

MR. LOMBARDO: That,I understand,is the conclusion that the defendant and I have come to after consultation. I understand that the defendant has authorized me not to call any witnesses on his behalf and he, himself, does not wish to take the stand in his own defense.

THE COURT: Well of course, Mr. Lombardo, the defendant is the best judge as far as the defendant

is concerned, as to whether or not he wants to testify. He's under no obligation, as you and I know. But so long as you have advised him and he has made a choice, and that is not to take the stand, the record will so indicate that it is his choice.

Now, as to advising the jurors, pursuant to Section 300.10 of the Criminal Procedure Law, what is your pleasure? Do you want me to give them such advice?

MR. LOMBARDO: Your Honor now specifically is referring to whether you are to charge the jury that the defendant need not take the stand and no inference is to be drawn?

THE COURT: Yes.

MR. LOMBARDO: Or whether your Honor will not touch on that point at all?

THE COURT: I will not touch on that or I will say to the jury that under the law the defendant has a right to take the witness stand in his own behalf and he has a right to refrain from taking the witness stand. In this case the defendant has chosen not to take the witness stand. No unfavorable inference is to be drawn therefrom. Period.

MR. LOMBARDO: In the event, your Honor, that I were to request you not to charge the jury to that effect,

I assume that your Honor will charge the usual --

THE COURT: (Int'g) That there is no burden upon the defendant. The burden is on the prosecution.

MR. LOMBARDO: In that case I prefer, and I take this responsibility as a member of the bar, I would prefer that your Honor did not make any reference at all about his failure to take the stand.

THE COURT: Since counsel will both sum up very shortly, I want to advise you, Mr. Lombardo, that my understanding is based upon the examination of the records in this case, that Mr. Justice Barshay, at a previous trial of this defendant, withdrew the so-called common law count. That is, the count which is couched in the language of Section 125.25 Subdivision 1. That is with intent to cause the death of another person, did cause the death of such person. Since that count was dismissed by Mr. Justice Barshay, it has no part in this trial and I will charge the jury only as to the first count of the indictment, that is the so-called felony murder count.

MR. LOMBARDO: My reading of the record coincides with the view your Honor has expressed, and I think that your Honor would be perfectly correct in doing what you will do.

THE COURT: In view of the fact that I am

charging only common law count, I will not charge any other degrees of crime. I will not charge manslaughter.

MR. LOMBARDO: You are charging under the felony count?

THE COURT: I will charge only the crime of murder as it is defined in Section 125.25, Subdivision 3, that is, during the course of an attempt to commit or the commission of a crime of robbery or in furtherance of the objective of the defendant to commit that crime.

I will also charge on the law of accomplices and the law of principles, and as you know, I shall charge on the law of flight.

MR. SCHMIER: And circumstantial evidence?

MR. LOMBARDO: I truly wonder if circumstantial evidence has a part in this case, your Honor.

MR. SCHMIER: May I be heard, your Honor?

THE COURT: Well, it is not necessary. The ultimate question to be presented to the jury is whether or not the defendant aided or abetted or was part of a conspiracy entered into by two or more persons, including himself, to commit the underlying crime of robbery, and that being the case, and in view of the fact further, that in this trial there is no eye-witness testimony to the effect that the defendant himself was

seen in the place. The only way the District Attorney, the People or the jurors may consider the evidence in arriving at a conclusion as to whether or not the defendant, himself, was in or was not in the place, is by reasoning from established circumstances.

Now, if the jurors are satisfied, beyond a reasonable doubt, that certain circumstances were established factually or established, or let us say established beyond a reasonable doubt, the jurors may then reason from such established circumstances towards the ultimate conclusion And I shall charge on circumstantial evidence fully as to the manner in which circumstantial evidence is circumscribed as to the conditions and the rules under and pursuant to which jurors must consider circumstantial evidence. I think that it is my duty to charge circumstantial evidence in view of the fact that there is no eye-witness to the District Attorney's contention that the defendant actually was in the premises. All right. Have the jury come in.

(JURORS BROUGHT INTO THE COURTROOM)

MR. LOMBARDO: Your Honor, for the record, may I except your Honor's ruling?

THE COURT: Yes.

(ALL JURORS PRESENT. TWELVE PLUS THREE ALTERNATES)

THE COURT: Good morning madam and gentlemen.

THE CLERK: Jurors please answer.

(ROLL CALL TAKEN BY CLERK OF ALL JURORS AND ALTERNATES)

THE CLERK: All jurors present. Defendant present with counsel. D.A. present.

THE COURT: Mr.Foreman and madam and gentlemen. I want to assure you that we have been busy from half-past nine this morning. In every case which comes into the Supreme Court, there are questions of law which have to be ironed out. There may be other circumstances which contribute to delay, but please be assured that notwithstanding that, we had hoped to begin promptly at 9:30. That was the reason why I asked you belatedly to come in at 9:30.

Matters were brought to the Court's attention by both the counsel for the defendant and the counsel for the People of the State of New York, the Assistant District Attorney, which required considerable discussion and argumentation. And certain matters which the Court had to, of which, the last of which had to advise counsel on both sides before we proceeded further in the case. And that has all been completed, and we're ready to resume the trial at this time.

The jurors should know, also, that yesterday

afternoon, of course you know that we recessed so that the Court might make a determination as to one particular question of law. That has already been resolved and we need spend no further time on that. All right.

MR. SCHMIER: Your Honor, you having advised the jury that you had legal determinations and those legal determinations having been made, the People rest.

THE COURT: Mr. Lombardo?

MR. LOMBARDO: May I make the customary motion, your Honor?

THE COURT: Oh, yes, you may make the customary motion at the point where the People rest.

MR. LOMBARDO: At this point, your Honor, the defendant respectfully moves to dismiss the indictment.

THE COURT: The motion is denied.

MR. LOMBARDO: The case is now with the defendant, your Honor?

THE COURT: Yes.

MR. LOMBARDO: The defendant rests.

THE COURT: Defendant rests. Both sides rest.

MR. SCHMIER: Both sides rest.

MR. LOMBARDO: On the entire case, your Honor, may I renew my motion?

THE COURT: You may, and your motion is denied.

I take it, gentlemen, that you're ready to sum up?

MR. SCHMIER: Yes, sir.

MR. LOMBARDO: Yes, your Honor.

THE COURT: Mr.Foreman, madam and gentlemen of the jury, let me again take you back to the point early yesterday when I advised you as to the nature and the purpose of the opening statements. At that time I said whatever was said by counsel during opening statements does not constitute evidence. Similarly so, as to summation, whatever is said by counsel during summation is not evidence in the case.

Under the law, you will remember I said yesterday, the People open and close a criminal case. As a matter of fact, in every case the plaintiff opens and closes the case.

Now, I said to you yesterday that the law directs the order of procedure with regard to summations. It also directs the order of procedure, that is with regard to opening. The law also directs the order of procedure with reference to summation and in line with what I just said, that the People open and close the case, the People open the case by making the first opening statement, and the People will close the case

by making the final summation.

Counsel for the defendant will sum up first. Bearing in mind what I have said, that summation is not evidence, you will understand, I'm quite sure, that the summations by counsel serve a very useful purpose. You see, it will not be long before you are asked by the Court to retire to the jury room and begin deliberating. At this point, and before I charge you as to the law, the law wisely dictates that counsel for both sides, the defendant's counsel, ccunsel for the People of the State of New York, should have the right to stand before you and in a manner of speaking, discuss the case with you.

Each one of counsel will have a right to argue the case, argue for his respective side of the case. Counsel may go over certain testimony and after going over that testimony, may then argue that you should follow the same line of reasoning that the particular counsel places before you during his portion of the summation phase of this trial.

Now that does not mean, of course, that you must, out of hand, accept everything that counsel say, nor does it mean that out of hand you must reject what they say. Not at all. Summation, as I said, is very helpful to jurors. It may be helpful, it may not be helpful.

Should counsel, either one of counsel, at any time during summation refer to the testimony of any witness and in referring to that testimony say something that counsel believes the witness said while on the witness stand, if that statement as to what the witness said does not coincide with your recollection of what the witness said, then of course you must reject what counsel says as to the witness' testimony and adopt and utilize your own recollection of the testimony.

You see, that is inaccordance with the rule that the jurors are the sole and the exclusive judges of the evidence in the case. Do you understand that, gentlemen, do you not? Madam?

(ALL JURORS NOD)

THE COURT: Now, should counsel present an argument to you while you're listening to that argument, you say to yourself,"Well now, that sounds pretty solid, that sounds like it is persuasive. That sounds like it is a real pertinent, cogent, a real persuasive argument, and I'll accept that, I think that is good thinking." Then you just accept it.

However, if counsel presents some argument and while he's presenting it you are listening and saying to yourself,"I don't follow that at all, I don't go for that kind of reasoning. I don't like that argument,

and I'm not going to accept it, and I'm not going to use it," then you just don't use it, gentlemen. That's what you're here for, and that's why summations are had, so that as I said, counsel may try to win you over to their respective side of the case.

Now, so much for that, and I think you understand clearly what the purpose of summation is. You will now hear summation from Mr. Lombardo, counsel for the defendant.

MR. LOMBARDO: If it please your Honor, Judge Kern, Mr. Schmier, Mr.Foreman, madam, gentlemen of the jury. It is always very difficult to follow Judge Kern. He is so succinct on the law, and sometimes lawyers tend to be overwordy. I'm going to try to avoid that if I possibly can.

Now, this has been an extremely short trial. The District Attorney has had the opportunity to present whatever evidence which is legal evidence, which could be submitted to you, and we now come to the point of the case where, as his Honor said, the attorneys will review the evidence, talk facts, not law. That is his Honor's province, as he stated at the beginning. And the best way I can put it to you is that under the law which binds me and binds Mr.Schmier and binds his Honor, and everyone in the courtroom,

including you gentlemen and madam, in the event you or your loved ones or friends would be in the position where you would be at a bar of justice in the court of law. The laws are made for all and they govern all. The law and facts are not for this case, are not for this charge, but they're for everybody. Please keep that in mind. Laws are made for everybody.

Now, the two attorneys in the case, Mr.Schmier, as I told you, is one of the chief trial attorneys in the District Attorney's office, and as I indicated in my opening selection of the jury, he knows nothing about the facts in the case. He got them from what the law would call hearsay. He got it from what other people said.

I am in the same situation. I got the facts on a hearsay basis. As far as Mr. Schmier is concerned, this is a case he was assigned by his office to try, and he is doing that. As far as I was concerned, as I indicated to you, I was assigned by the Supreme Court to defend this young defendant, and I'm doing that to the best of my ability.

His Honor is doing his duty. His Honor is presiding fairly and impartially and in a most learned manner in the trial.

The two individuals, and I'll consider the jury

as an individual, the two individuals who are most concerned in this case are the defendant, himself, and the jury. You have to make the decision, and the decision affects him. Mr.Schmier will go on to other cases, I'll go on to other cases, his Honor will go to other cases, the clerks in the courts, stenographers, spectators, other cases, but this case, the decision affects you and the decision affects the defendant in a very, very personal way.

I'm going to discuss some evidence with you, and I assure you with every bit of sincerity that I possess, that whatever I say to you is what I honestly and truly understand the evidence to have been. If, however, I say something to you which doesn't reflect your own recollection of the evidence, then by all means disregard what I say and follow your own recollection of the evidence.

Now, Mr. Schmier, under the law, not because he wants this advantage, but under the law speaks last. I can't answer anything he has to say. I will say everything to you that I think is pertinent and that I remember, and that I think will aid you in arriving at your verdict.

I can't go into the jury room with you, so in the event a question arises,I would like what I say

to you to be considered by you as if I had the opportunity to just go over that jury box rail, sit with you and deliberate, and these are some of the things that I would say to you if I were sitting as a juror.

Of course, the crime with which the defendant is charged is the most serious crime known to our law, and for that reasoh I think it is fair for me to ask that you give it most serious consideration and deliberation. This is not a light matter.

You arrive at your verdict in your deliberations either from the evidence that is in the case or from the lack of evidence in the case. The two pretty much are to be measured in the same manner. There is certain evidence coming from the witness stand and then you have a right to say to yourself,"Why wasn't other evidence introduced by the People, who have burden of proof? By the People, who must prove the guilt of this or any defendant in any criminal case beyond a reasonable doubt, by competent, by legal evidence?"

We have in this case, essentially we had two kinds of witnesses. We had what I will call lay witnesses and professional witnesses.

There is no question about the fact at all that a man met his death in this superette.

And that he met his death by reason of a bullet which

entered into his body and which, on the way out, hit a rib, and I think the testimony of Dr.Wald was that the rib was broken and that the bullet exited. There was no question about that.

All the other questions begin to arise. The People of the State of New York come into this courtroom and they say to you this defendant Rickenbacker, he did it, or he was part of it, and we're going to prove it. We're going to prove it and we're going to prove it to your satisfaction beyond a reasonable doubt. His Honor told you, and I'm sure will tell you again, that in every criminal case the defendant has no burden. The defendant takes the position, and in any criminal case, you prove it. It isn't the defendant who takes the position, it is the law that says that this is the posture of a defendant in a criminal case, and that this is the posture of the People in a criminal case. It says that you've got to prove the guilt of the defendant beyond a reasonable doubt by hard evidence, not by speculations, not by a surmise, not by a hunch, not by a guess, but by hard evidence.

What is the evidence in this case? Actually,this case is characterized, I think, by lack of evidence, rather than by the evidence in the case. Example,

did you ever hear of a science called "ballistics", where you prove beyond any doubt that a bullet came from a certain gun? Was there any ballistics test in this case? None. Was there any evidence in this case as to where the bullet that entered the body of the victim came from? Do you remember that fanfair, and I must say I don't think Mr.Schmier was party to it, where two guns were paraded into the courtroom? Was there any proof by anyone that any of the guns were operable? That any of the guns could be fired? But you remember the first witness. He testified that he fired two shots. Mr.Fischera is the way he pronounced his name. He fired two shots. Was there any proof in this case that the bullet that killed the victim didn't come from his gun? No. You heard testimony from a police officer, a professional witness, that he saw this defendant throw a gun between two parked cars. Now, he said he saw that, remember, he saw that. He also said, and the other police officer, Scannapeco, said the same thing, that they saw this gun in the hand of the defendant.

Did you hear one single word about fingerprints? Huh? Not a word. Is it fair to have you believe that no fingerprints were taken of that gun by the police department? Is it fair to have you believe that

no ballistics tests were made on whatever revolvers were involved in this case, including the revolver of Mr. Fischera in this case? Is it fair to attempt to have you believe that? And if those tests were made and no evidence was produced, why? Why? You have a right to ask yourselves that question. Do you think for a minute that if the result of those tests were unfavorable to this defendant they wouldn't have been paraded to the witness stand? If what I say to you is common sense, please consider it. If it isn't, don't. But I know that I would if I were sitting as a juror, I would want satisfactory evidence as to these points, none of which, not a single solitary word came from that witness stand from the professional witnesses.

What does the District Attorney come in with? He comes in with what he has. Now, the lay witnesses, those who were in the store, those who were present, those who saw and heard everything that went on, none of them identified this defendant. And as a matter of fact, if my recollection serves me right, one of them testified that there were two men in the store and the other one testified that there were three, but I'm not quite sure on this point, whatever your recollection is. But in any event, no identity, no identification from the lay witnesses.

But now we get the professional witnesses, and this is not a slur, or not intended in any way to be a slur upon the Police Department, upon the individual officers, but I say if I were sitting in your jury room and deliberating with you, I would raise this point.

Patrolmen Welsh and Scannapieco both testified that they heard shots. I'm not quite clear in my own mind whether they heard two shots. Your recollection will govern, but they heard shots. Now, if they only heard two shots, if their testimony was that they heard two shots and,in fact, there were two shots, those were the two shots that were fired by Mr.Fischera, and again we go back to the point, whose gun fired the bullet that killed the victim in this case?

But leaving that aside for the moment. The testimony is, and I'm only concerned with this defendant, with Robert Rickenbacker, I'm not concerned with the other defendants. They see three black men, and these three black men are running, and you remember, I asked a question, "Were they running fast?", and they said "Very fast." And the police officer who says he was there says they were running very fast.

Now, just open your minds, eyes. Three black men running very fast. Number one, how can you

distinguish one from the other? Number two, you see a person sitting down, Mr.Schmier, myself, his Honor, the defendant in repose, the way you gentlemen are now, and you madam, you're face is set and composed; when we watch a football game or when we watch a runner on T.V., how they contort their face, how in the running. So even then with a contorted face or a distorted face of a person running, it is a normal natural thing.

How could you possibly, the first time you ever see a human being in your life, how can you come into a court so much later and say"He's the man that I saw"? No testimony that they ever knew this defendant before and no testimony that he was ever seen after. There's just that one time running, and the time in court.

Now then, you've got this other situation. I asked Patrolman Walsh, I made a note, how many corners did you turn while chasing the two defendants, or rather this defendant, and the other person whose name escapes me, as I say, I'm not concerned with him, and he said he turned five corners, which means that on five separate occasions he lost sight. And then I said to him,"How long did this total time take from the time you first saw Rickenbacker until the time that

you actually stopped and apprehended the other defendant?" My note says he said total of time of three or four mintues.

Now again, the questions come to mind. Police officers didn't testify they fired a warning shot, and their testimony was that they were chasing two men, at least one of whom was armed. They didn't fire a warning shot. Now, if they didn't fire a warning shot, any number of reasons, there might have been a lot of people around, which would be commendable. And if there were a lot of people around, how could he possibly keep his eye on these two defendants or at least on this defendant? And if he didn't fire a warning shot it is because he had nothing to fire the warning shot at. He never had an opportunity to do it. Is that a fair assumption?

Officer Scannapieco, the other professional witness, he said he got one look, because you realize his testimony, that he stopped at the car where one of the men got in, but even he got into the act. He got one look, but he was able to identify him with that one look. The other police officer, as I said, testified that as, I think his testimony was, that this defendant

turned around once or twice to look back, but that he could recognize him. He never knew him before, according to the testimony, and identifies him in court. Now then, we have the testimony of the third witness, Detective Marshall. Now, it is obvious that what the effect of his testimony was to try to lead you into believing, without saying it in so many words, that he was looking for this defendant and that he couldn't find him. The inference, I suppose, that they want you to draw from that is that the defendant somehow avoided being found, hid himself, flew to flight But still, where was he arrested? His testimony was he was arrested in Brooklyn.

Absolutely not a single bit of testimony that the defendant ever left Brooklyn, and how did this detective look for him? Between 12 midnight and six in the morning he would sit in his automobile outside a certain address and wait for the defendant. I don't know whether he waited for him or whether he took a nap. I don't know what he did. But what do people do between 12 and six? Twelve midnight and six in the morning. It looks nice on a report when you fill it in. Now I'll be accused of attacking the police department, I think, but what do people do between midnight and six in the morning? They sleep, don't they? Is that the

time to look for somebody? I could see if you go to the house between 12 and six, midnight and six A.M. But you sit in a car, in a nice comfortable automobile between 12 and six, and then, I think the expression is, the police have an expression for that, I don't quite remember what it is, but you might, so it is a nice way to pass a tour of duty.

Of course, there is absolutely no proof in the case that the defendant was ever in that store. And the witnesses who were closest to the picture, and those who had most to lose, and those who lost the most didn't go so far, didn't stretch it so far as to say that the defendant was in that store. The two police officers say they saw him running. They identified him. You know, if you were sitting on a jury here to determine whether or not a certain dog was to be sent to the pound and the evidence was that somebody saw him running and identified him, would you send a dog to the pound on that evidence? A dog, not a human being, but a dog, an animal? Was there one single word of proof in this case about any distinguishing characteristic of the defendant? Something at least that you could pin? He ran with a limp. He had red hair. He had unusually broad shoulders. He was very thin. Not a single word of that. Not a single

word of it

This has been a short case, Mr. Foreman, madam and gentlemen, and I'm not going to belabor the issue here. As I said to you when I first spoke to you, I repeat now. You are to judge this case as much by the lack of evidence produced by the People as by the evidence produced Certain things are fallible Vision is fallible. Hearing is fallible. Sensations as to distance, fallible. Feelings. Sometimes you touch something cold and you think it is warm. That's fallible.

But there are some things that are infallible. Fingerprints. Fingerprints-infallible. Therefore, no testimony of fingerprints Ballistics, infallible. No testimony as to ballistics. But the fallible testimony, yes, I saw him. He was running, but I saw him and I recognized him and I recognize him now.

I say to you, gentlemen, and I'm just about to close, that if ever a jury was presented with a case where the the People have failed, by a lack of evidence, to find the defendant guilty beyond a reasonable doubt, this is the classic case.

I don't want to conclude without saying that it is a privilege to try a case with Mr. Schmier. It is also a pleasure to be before a courteous judge, like

Judge Kern, and I do want to say that even though it has been a short trial, I think you have all been very attentive and I think you've listened to me very attentively, and all I say to you is remember the two people who are most concerned with this matter is the defendant, and the verdict that you render in this case. I am certain that after you have heard Mr. Schmier, whom I can't answer, and after his Honor charges you, that you will return the only verdict which is consistent with a lack of evidence in this case, and that is a verdict of not guilty. Thank you for your kind attention.

THE COURT: Mr. Schmier.

MR. SCHMIER: Gentlemen of the jury, madam. I, through my many years experience, hate to be drawn into a summation which stands up and refutes and belittles the argument of my opponent. I feel that a competent District Attorney should stand up and show you why the defendant has been proven guilty not only beyond a reasonable doubt, but at something which I'm not required to do, and the Judge will so advise you, beyond all doubt. But inexplicably in every case that I try, and this is said with due deference to Mr. Lombardo, and every other defense lawyer, arguments are raised which, to a lay jury, might seem important

and if a competent District Attorney doesn't answer them, some juror will be misguided into believing that there is some substance to something which has no substance at all, and I find it apologetically necessary before I go into my review of the evidence to destroy points which would fool one juror.

Gentlemen, ask me why I use the word "one juror"? You know, and you will be told in no uncertain terms that the verdict must be unanimous, and if one juror is fooled, the People have lost the case and I don't mean lose like Baltimore losing to Pittsburgh. We've lost on behalf of the People of the State of New York, to bring a defendant to justice whom the People feel merits justice in the form of a guilty verdict. We must convince 12 people. So, at the risk of believing, and it is possible that you have not been beguiled by Mr. Lombardo's spurious arguments, but at the risk, and I say of a competent District Attorney, and I feel I'm competent, that one of you may have been fooled, let me take some of his arguments apart, so apart that you'll realize how ludicrous it is.

Ballistics. Some of you may say, "Well, why didn't you prove ballistics, Mr. Schmier?" Why didn't you prove anything about the defendant's gun?" The defendant's gun, in the killing of the deceased, is as important

as your grandmother's underwear in this case. The People's contention has been that the fatal bullet was fired from the gun of a defendant who is not here, Morgan. And doesn't it follow in natural common sense that if Morgan were on trial and a gun was recovered from Morgan, that the District Attorney would spend every human effort to prove that Morgan's gun killed the deceased.

But we've given no contention nor do we even raise the contention that this defendant shot and killed the deceased. So, what's the difference whether his bullets are 22's, 38's or 156's, and what difference what bullet is in the deceased. It didn't come from his gun. So, are we dealing with a District Attorney who is a little boy and who tries to dramatize television cases by bringing in ballistics and bullets out of the deceased, and have you dramatically see a bullet when that bullet is as important as your grandmother's underwear? It wasn't his gun that killed the deceased, but he was a common scheme or plan and part of this four team, and each man is as guilty as if he had pulled the trigger and that's a matter for Judge Kern to take care of in his charge on the law.

He raised this sand in your eyes that maybe

Fichera shot the deceased. The police were standing out in the street. They hear two shots. Fichera says he ran after the running men and he fired two shots Isn't it drawn inextricably from the evidence that the two shots the police heard were the shots that Fichera fired? So, if Fichera fired two shots outside, if one of those shots, granted a miracle, had killed the deceased, didn't the first officer on the scene find the body of the deceased in the store? And wasn't there a shot in the store that killed the deceased? But the police didn't hear that shot and the reason they didn't hear that shot is,it is in the store and the reverberation of that shot did not go outside, so that the deceased, being killed in the store, had to be killed by Morgan's shot, which the police didn't hear, and the only shots the police heard were the two of Fichera. So why do we need ballistics to prove a point which is raised on summation, and as I sit there, I shake my head and say, if I wanted to argue every point before summation, I'd have to destroy things that were in Mr.Lombardo's mind, and I didn't know what was in his mind, but I knew that the evidence showed that the two outside shots were heard by the police and that's why there is no ballistics in this case

of Fichera's gun.

Mr.Lombardo has the privilege, clever privilege of defining the witnesses as the lay witnesses, and the professional witnesses. Now, you talk about professional witnesses and the police. But when you use the word "professional", you sort of shy back and say to yourself,"Are we talking about professional lawyers, professional prostitutes, pimps?" What do you mean by professional? But as long as he used the word professional, I'll seize upon that and say, yes, in a way they are professional. Why? Because as contradistinguished from the Ficheras and the son of the deceased, who were in the premises and who, when they see a gun, under ordinary circumstances might tend to watch Morgan's gun, to get frightened, to get nervous, as contradistinguished from police who day and night carry guns, who are trained men, who are trained to emergency, trained in observation, trained to size up situations and seize in seconds as contradistinguished from a citizen who, a citizen who having seen a gun might go to pieces.

These men are in every situation that you can think of as part of their daily life, as part of their way of life by accepting an assignment for their livelihood with the police department. So, they are

professionals, but professionals in observation, professionals in movement, professionals in observing, professionals in knowing how to go about their business. So, we talk about a warning shot, or any kind of shot by Walsh, who was running after. He was chasing two men, one of whom had a gun, and that man discarded his gun and once that man discarded his gun, was there any reason at all for a trained man, who knows his ability to realize how much he needs in strength and in running to catch, and with that,on the question of observation of face, Mr. Lombardo says. "Did they talk about extraordinary features, a limp and this?" Well, how are you going to chase a man and talk about a limp when maybe he doesn't limp. How are you going to talk about broad shoulders when he doesn't have broad shoulders, or how are you going to talk about a scar on the face when he doesn't have scars. If a man has no distinguishing features, you can't bring them in. But Mr.Lombardo would have you say,"Where are his distinguishing features?" He hasn't got them. You want us to manufacture them?

Manufacture them. That'a a beatiful word. Why can't a unscrupulous police department, in trying to pin down cases, say to law witnesses,"We're going to

show you somebody, and take a good look at him because we caught him with a gun and we caught him running away. I'm talking about Ferguson now, or Morgan or anybody like that and say, you recognize him as the man. The answer is, the lay witnesses are treated as human beings, and they're asked"Did you see the face of the third man?", and they said "No."

Too many movies and televisions depict witnesses beingtrained and being told what to say. The fact remains it's a pride in the escutcheon of the police department, the District Attorney's office, that when witnesses say "We don't recognize his face --"

MR. LOMBARDO: (Int'g) I m going to object to that, your Honor.

THE COURT: Objection is overruled.

MR. LOMBARDO: He's putting his office on the line, your Honor.

THE COURT: This is argument. Objection is overruled.

MR. LOMBARDO: All right.

THE COURT: He's not putting his office on the line.

MR. SCHMIERL: The fact that the lay witnesses didn't recognize, how about them being nervous, how

about the witnesses being worried about their safety and looking at Morgan with a gun, worrying whether he's going to shoot that gun. Does the average witness who, when possible, if he were a miracle man, and anticipated being a witness say, "Now let me see, I'm not going to look at the man with the gun. I'm going to look at the second man, I'm going to look at the third man because some day there may be a trial and I want to be able to say I recognize all three. We don't work that way. We do what our instincts tell us. These three men didn't say, but the trained observers, the police, they saw, and whether he saw, the fact remains he walked right back and he picked up the gun where he said the gun was.

That's what we mean by destruction of arguments that are tended to blind you. But what does the District Attorney offer in evidence to open your eyes not to blind you as the defendant's lawyer does, but to open your eyes on the question of reasonable doubt? The lay witnesses in the evidence of the case said that they are sure of Morgan and Ferguson, Morgan with the gun that killed the deceased. They both saw a third man but they didn't recognize him. That's evidence.

Now, to connect this defendant with the conspiracy,

with the murder, with the holdup, the officer, both officers identified Morgan, Ferguson, who were caught at the scene, and this defendant as he came running down the street. And if you believe from the evidence that Morgan and Ferguson were found at the scene, and arrested at the scene, and Morgan with a gun, which he threw into the front of the car, then you have a right, if you believe that the officers did see Rickenbacker, then who was running down the street with the killer, and the other man who raided the register, Morgan, Ferguson, caught at the scene, running down the street with the third man, and you have a right to decide that they were coming from the movies, that they were coming from a basketball game, that they were coming from the junior prom in their high school, or you have a right from the evidence of the lay witnesses, to decide that the three of them were running down the street from a robbery which they had just committed, in which an innocent man lay dead in the store. That ties him in, inextricably ties him in with Morgan and Ferguson, who were identified right at the scene.

Now, Mr.Lombardo, and every time I mention his name, let no man in this jury, or woman in this jury be tricked for one moment in my argument, the character,

integrity, and ability of this man. It is unscrupulous, but he's doing a job and it is for you not to be fooled by that job. Mr.Lombardo, in his argument, takes flight and says, "Did he ever leave New York? Wasn't he caught in Brooklyn?" The officer spent an easy tour by sitting in his car. The evidence of DetectiveMarshall is, gentlemen, madam, Rickenbacker was caught nine months later and nine months later from the moment of the killing, nine months later when arrested, "What is your name?" "Robert Rickenbacker." "Where do you live?" "Sixty-three Decatur Street." That's in the evidence. That's nine months later. Where did Detective Marshall go 12 o'clock on the night of the killing? Where did Detective Marshall go on the night of the killing? Sixty-three Decatur Street. Isn't it drawn by reasonable people inextricably that at 12 o'clock at night on the night of the killing, Marshall was looking for Robert Rickenbacker? The night of the killing he was looking for Robert Rickenbacker, and it is for you to determine why did Marshall go to the house or the house of any of these people.

Why did he go at 12 o'clock at night to Robert Rickenbacker? Why did he go to every place looking for Robert Rickenbacker? Why did he stake out

Robert Rickenbacker's house from evening to morning? And Mr. Lombardo does forget that it was broken into two sections. "How many times did you revisit the house?" "A dozen. And then I also had stake outs."

He was looking for Robert Rickenbacker. He went to New York. He went to Queens, to bar and grills, to a flop house, and each time you have the conclusion he was looking for Robert Rickenbacker. Where was Robert Rickenbacker for nine months? In flight. Who runs? Who runs, the innocent? Who runs, the innocent or the guilty one? The guilty run and as the guilty run, there he sits, guilty.

THE CLERK: The Court is about to charge the jury. All people who wish to leave, please leave now.

THE COURT: Mr.Foreman, madam, gentlemen. We have just had the distinct pleasure of hearing the summations made by two of the finest lawyers we may boast of here in the State of New York, if not, in the country.

Each one has done his particular job with dedication, with the highest degree of competency, and in the finest tradition of the legal profession. You see, madam and gentlemen, here in a court of law, and this is something we boast of, you deal

with the cold, hard realities of life and in connection with the realities of life, you participate in a trial, and you understand the meaning and the purpose and the ultimate objective of this proceeding which we call a trial. And you begin to understand, early in the proceedings, how unlike is an actual trial of a criminal case from that which you see depicted upon the moving picture or television screen by some writer; he may be a Hollywood ham and then again he may be a writer of ability and standing

These matters which are portrayed on the screen, whether the principal figure around which the store revolves as a Perry Mason or some other benighting figure, has no relationship whatever to a real trial. Perry Mason doesn't practice here. He wouldn't be permitted to practice here and some of the last minute shenanigans you find on the television or moving picture screen just do not happen in real life.

And the things which a Perry Mason might pull, and I guess that's the proper word to use for the amusement of television viewers, just is not done. Believe me when I say that. That is why lawyers, when they watch these whodunnits on the screen find

their toes curling and they find their flesh creeping at the shocking horror, the unspeakable travesty which they see portrayed on the screen as a trial for the amusement, and according to the producers, the education or the edification of the layman.

That is why I said earlier in this trial, and if I didn't, I should have said it, jurors are not to constitute or make of themselves detectives in the tradition of a Perry Mason, reaching out into the cold blue for some fanciful theory upon which they might acquit or convict. Jurors must guide themselves by the evidence and the law. Jurors must envelop themselves in what I like to call the cold neutrality of the impartial judge and make a decision, as I said earlier in this case, upon the evidence and the reasonable inferences that a reasonable and prudent man may or would draw from facts which have been established to your satisfaction beyond a reasonable doubt.

You see, madam and gentlemen, let's just imagine ourselves sitting around a conference table or better still, since I'm going to charge you as to the law as to legal concepts, let's imagine that we're sitting in a classroom, in a law school. Now, I understand

full well that you, madam, and you, gentlemen, are not lawyers and are not trained in the law and for that reason, during this charge, which is another way of saying during this period devoted to my giving you advice as to legal concepts, I'm going to speak slowly and I'm going to use emphasis where emphasis is necessary only to bring home a point. I'm going to use plain simple language. I'm not going to resort to the jargon or the folderol, the linguistic folderol that lawyers, just as doctors, indulge in when they're talking shop. Also, that you might better understand.

Now you see, madam and gentlemen, in the final analysis, and please understand that when I raise my voice to emphasize, it is only for the purpose of bringing you to a point where you better understand what it is I'm saying. I have emphasized so many times the presumption of innocence. You see, I raised my voice which protects every defendant in a criminal case just as it does this defendant. I've emphasized the burden which the District Attorney bears. I've emphasized the need for proof beyond a reasonable doubt. I've already talked about those things, but repetition as to some of the important facets of the law may, and I believe will be of considerable value

because you are not lawyers and I must make these points crystally clear.

Now, speaking generally, of course you know what we're here for. I'm a judge, and you are judges. I'm a judge of the law, you're a judge of the facts. I assess, I appraise the law. I present my version of the law to you, which you are bound by. You appraise and evaluate and present your version of the evidence or as to what happened on July 30, 1970, and I'm bound by that.

You see how this is a mutual relationship? I must respect your rights under the law and I say, you, with the greatest humility, must accept my rights. Although I have discussed with you the matters which I've referred to, I'm going to mention them breifly and I'm not going to go into these matters in detail.

You know, members of the jury, that you are the sole and the exclusive judges of the evidence and the believability of witnesses. You know, also, from what has been said that I am the sole and the exclusive judge of the law. You know the purpose of all law, all law that has ever been made on this earth is to assure the greatest degree of safety and protection to the greatest number of people. That's why we have laws. Laws are made for the benefit of all persons

and no one is exempt, no matter who he is, or where he comes from. Laws are made to govern and regulate the conduct of man towards man.

Without law we have no society, we would have no civilization, we would be back in the jungle of centuries and centuries and centuries ago, every man doing what he wants to do. So, as a civilized people, we have laws.

You, madam and gentlemen, the 12 jurors who enter the jury room to deliberate, will each one of you, wear an invisible robe such as I will, because you, at that point, become judges and when I use the words cold, hard neutrality of the impartial judge, I mean you must make a decision right on the evidence and right on the law without deviation, without modification of any kind whatsoever.

Only in that way, madam and gentlemen, can both sides get a fair and impartial trial within the meaning of the oath which a jury takes to well and truly try the issues in this case upon the evidence and upon the law. Only in that way may a defendant get that kind of a trial.

Only that way may the People of the State of New York get that kind of a trial because we must

recognize at the very beginning of our deliberations that there are two sides to the coin. One side contended for by the prosecution, one side contended for by the defendant.

And only if we understand these basic propositions will jurors be able to function as they were intended to, and I have no doubt that you folks will be able to function that way.

This defendant is accused of the commission of a crime. Early in the proceedings, I told you that the burden of proving guilt beyond a reasonable doubt rests upon the shoulders of the District Attorney, and that no defendant in any criminal case is obliged to prove his innocence. He is not obliged to come forward and prove his innocence. You see, it is something altogether different, to have the burden of proving guilt, which is the District Attorney's, beyond a reasonable doubt, as I shall define the meaning of those words, beyond a reasonable doubt, and quite another thing to say that the defendant has no burden. He doesn't have to move forward, and that is so. He doesn't have to prove anything.

When the defendant came here some months ago with his lawyer, and the charges were read to him,

and his lawyer was given a copy of the indictment, a copy of the indictment was made available to him, he was informed of the nature of the charges against him. And he entered a plea of what we lawyers call "Not guilty". That isanpther way of saying,"If the Court please, I am not guilty. I did not do this." It's another way of saying,"Mr.District Attorney, the grand jury of this county accuses me of this crime. Go ahead and prove it on me,"in the vernacular,"beyond a reasonable doubt."

You see, that's because the presumption of innocence protects him, and if the District Attorney doesn't move forward with any witnesses, what have we got left? The presumption of innocence. You see? Therefore, the District Attorney must move forward to overcome that presumption of innocence, and that presumption of innocence, as I said, remains with the defendant throughout the whole trial, even while you are deliberating in the jury room. It stays there with him like a guardian angel until the moment arrives, if it does, that the jurors are convinced, beyond a reasonable doubt, as I shall define the meaning of those three words or four words. If that moment does come, then the presumption of innocence disappears

completely It is gone forever. It exists no more.

Now you notice, I don't read a charge. I never do --oh, yes, I did once. My first week as a Justice of this Court, quite sometime ago. I don't read a charge, madam and gentlemen, because reading a charge would necessarily compel me to mumble, and speak in a undertone. I don't think that lends it to understanding. You see, I prefer to sit here and reason with you, and in a manner of speaking, discuss this with you, because should you be in doubt as to the meaning,as to the legal significance of anything I say, all you need do is raise your hand, and don't worry about getting me off the track. There is no track.

If you are unclear, if you are in doubt as to any of the legal concepts as to which I shall speak, do not hesitate to raise your hand and I'll use other language in an effort to make it clearer.

You will remember that during this trial I do look at some notes once in a while to remind me of things I should say, as I'm doing now. You will remember that during this trial, on many occasions, the District Attorney and counsel for the defendant, more than once raised their hand to object or to

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make a motion. I've already explained to you what that means. You are to draw no inference whatsoever, you are not to speculate as to the reason or the reasons why I rule as I did with regard to any objection or with regard to any motion.

What were presented were questions of law. It is my job to rule on questions of law with which you are not concerned, although you are concerned now with the law as I charge you the law. But jurors are not to speculate for a single solitary moment that the judge ruled in favor of Mr. Lombardo because the judge likes his particular side of the case, or that the judge ruled in favor of the District Attorney for the same reason. Not at all, madam and gentlemen; I assure you that when I made my rulings, I made them on the law no matter who it helps or hurts. And that's the way jurors should react to their consideration of the evidence in the case. I assure you that the District Attorney and Mr. Lombardo are very, very close or at least I consider them very close friends of mine, and I hope to be considered a close friend of theirs.

But that doesn't make a bit of difference. When we're in a court of law, decisions should be made upon

evidence and upon law and not upon the particular likes or dislikes that a judge might have for one side or the other, or upon any of the particular likes lor dislikes that a juror or jurors might have as to the law. I made my decisions based upon the law and nothing else.

And talking about the likes or the dislikes of a juror, as to the law, You'll remember what I said to you, there are many, many laws upon the statute books of our state and country, and many, many, many laws contained in the decisions of the highest courts of our land with which judges do not agree, but nevertheless, judges, like jurors, have taken an oath and they must adhere to the law whether they like it or not, and so I emphasize, gentlemen, and madam, as emphatically as I can, that you must cast aside your own idea of what the law is or what the law ought to be and accept and apply only that which I say to you now is the law of this case.

The law directs, madam and gentlemen, that I say to you that you must not, for a single solitary moment, even think of the word, "punishment." Punishment, if any, which is to be imposed upon a defendant in the case of a finding or a verdict of guilty

is not the concern of the jury. It is solely and exclusively the concern of the judge presiding in the trial and that's why there are some jurisdictions where jurors consider, they suggest or fix punishment. Not here. We believe that a juror serves his purpose best if he has an opportunity to concentrate, to expend all of his mental faculties upon the one important job and that is to find out, as well as is humanly possible to do so, what happened on this day, July 30, 1970, without diffusing their energies, without bothering about thoughts of possible punishment in case of a verdict of guilty. So you see, madam and gentlemen, you must not even permit the word punishment to enter into your thoughts while deliberating.

As to the law, I believe I have adequately emphasized you need to accept the law as I give you the law without modification of any kind whatsoever, and I'm mindful, of course, of the fact that I talked with you on this subject early in the trial. You must not legislate new law in the jury room, you must not repeal law in the jury room, whether you like it or not, you must accept the law as I give it to you.

Now, madam and gentlemen, what is it that we have

before the Court? I suppose the best place to begin is at the very beginning now that we have all of the philosophizing as to the rationales, and the purposes and to the meaning of the laws out of the way.

We have an indictment. What is an indictment? Here it is, and I'm holding it up. This is a paper which is on file in the office of the clerk of the court. An indictment is a complaint. That's all it is, it is a charge, it is the paper which lets the defendant know what the charge is against him, and an indictment itself has no probative value. In other words, one must not be heard to say, "He's indicted, therefore he must be guilty," at all.

If you wanted to sue someone for money which you claim someone borrowed, you go to your lawyer and he draws up a complaint and the man you're suing gets the complaint and he files an answer. Well, when the defendant and his lawyer came here some months ago, he was told of what is in this indictment and he was informed of the nature of the charges so that he might prepare for trial. That's the purpose of an indictment.

Now, this indictment is captioned "Supreme Court of the State of New York, County of Kings." That's where we are now. The People of the State

of New York against Zachary Morgan, David Ferguson, Curtis Austin and Robert Rickenbacker. Let me pause here. You notice the plaintiff in this case is not any member of the family of the dead man, Vito Petrancosta, at all. The plaintiffs in this case are not the police officers or the police department, not at all. The plaintiffs in this case are the People of the State of New York. These witnesses were brought here to testify, as witnesses. That is all. The plaintiffs are the People of the State of New York for good and substantial reason, the reason being, as I said, that the laws are made by the People of the State of New York acting through all of their representatives in Albany and in Washington, and if one of those laws was broken or violated, such broken, such violation is contrary to the peace and the dignity and the repose and the good will of all the People of the State of New York. That's why the People of the State of New York are the plaintiffs.

Now we go on. I read four names, including the name of this defendant. As I said early in this trial, you must not speculate as to why the defendant is on trial alone in this case. You must not, for a single solitary moment, ask yourselves why the other three

men are now now on trial.

Where an indictment charges more than one person with a crime, the People of the State of New York are at liberty to proceed against all of them, if they wish to or against one or two or more if they wish to.

In this case, at this time in this trial, the People of the State of New York are proceeding against Robert Rickenbacker. Now the indictment, madam and gentlemen, is as follows, and I'm going to submit to you as counsel on both sides have already been informed, the first count of this indictment, and I'm going to read that count. "The Grand Jury of the County of Kings, by this indictment, accuse the defendants of the crime of Murder committed as follows: 'The defendants, on or about July 30, 1970, in the County of Kings, having attempted to commit and committed the crime of Robbery, and in the course of and in the furtherance of such crime and of immediate flight therefrom, caused the death of Vito Petrancosta, he being other than one of the participants by shooting him with a loaded revolver, thereby inflicting divers wounds and injuries upon Vito Petrancosta and thereafter, on or about July 30, 1970, the said Vito

Petrancosta died of said wound and injuries.'"

In short, this indictment, this count which I just read is what we lawyers call the felony murder count. That is, a killing committed during the perpetration of a crime, a felony, in this case, robbery, and in the course of and in furtherance of the attempt to commit the crime of Robbery or while commiting to attempt the crime of Robbery.

It doesn't make a particle of difference if anyone intended or didn't intend to bring about the death of a person who was not a participant. Not a bit. You must be satisfied, beyond a reasonable doubt, however, of certain things. First, that there was a robbery. Secondly, that during the course of the commission of this robbery or of an attempt to commit the robbery, and in furtherance of the objective of those who were commiting the crime of robbery, a person, other than one of the robbers, was killed. That must be established beyond a reasonable doubt.

Of course, there must be what we call the general intent to commit the crime of Robbery, not to kill. Even if a gun went off accidentally during the perpetration of a robbery, if you are satisfied, beyond a reasonable doubt, that a robbery was in progress, that

comes within the meaning of the section of the Penal Law which defines this crime or perhaps I would do well to read the language of the statute. It is very brief. Section 125.25, subdivision 3 provides: "A person is guilty of Murder when acting either alone or with one or more other persons he commits or attempts to commit robbery and in the course of and in furtherance of such crime or of immediate flight therefrom, he or another participant, if there be any, causes the death of a person other than one of the participants."

The District Attorney contends in this case that this defendant and three other men, on July the 30th, 1970, entered this grocery store on the corner of Albemarle Road and Nostrand Avenue. One of them went to the cash register with a gun in his hand and another stood nearby and a third man at the door with a gun in his hand were perpetrating a robbery, and during the course of that robbery they killed someone who was not one of the robbers, that is, Vito Petrancosta. That's the Peoples' contention.

First, it must be established, beyond a reasonable doubt, that those who were involved in the proceedings in the store before the shot was fired, intended to commit a robbery. You see, I don't say intended to

kill anyone. That is entirely foreign to the whole matter here. It doesn't make a particle of difference whether anyone entended to kill anyone, even an accidental killing, while in the course of the commission of the crime of Robbery, or the attempt to commit the crime. That makes the participants culpable under the criminal law.

Well, when we talk about general intent to commit a robbery, we mean general intent to commit this crime as distinguished from an accident. Well, the defendant, if indeed you find that the defendant was one of the men, and the other three men go into the store for the purpose of commiting a robbery, was that their intent? Is that what they intended to do? Well, was it intent? What do we mean by that? Of course, we're talking about the legal definition. If I ask you in private, what the word "intent" means, you'd laugh at me. You know what it means as well as I do, with the intention of doing the act which consti tutes the crime. You see, intent is defined by our law as follows, and this is very brief. "A person acts intentionally with respect to a result or with respect to conduct described by a statute defining an offense when his conscious objective is to cause such result

or to engage in such conduct." It's very simple.

Let me illustrate. You know we can't look into the human mind to determine what one intends to do, but the law says jurors have a right to consider all the circumstances immediately surrounding the act itself in order to determine what the actor intended to do, and counsel will forgive me if I resort to an illustration which I treasure. I think it is very pointed and I always use it.

If I were walking down the street swinging an umbrella on a nice sunny day, and all of a sudden I hear an exclamation of pain, and I turn around and I see a man rubbing his knee. I didn't even know the man was there. Now I, just swinging this umbrella, and nobody could conceivably say I intended to assault the man. I didn't even know he was there. You see, now that's an accident. There is an act committed with no intent. But suppose with that same umbrella I continued to walk along the street and I get into an argument with someone on the corner, and when the argument grows hot and eloquent, I raise that umbrella above my head and I say to my adversary,"I'm going to crack your skull," and I bring that umbrella down with all the force at my command upon my adversary's

head, if you were then asked what I intended to do when I raised that umbrella, you take into consideration the circumstances before I did that, my language, "I'm going to crack your head," and then you may arrive at the conclusion that I intended to strike him on the head and that it was not accidental. You see?

A moment ago you saw me pour some water into this glass. If you were asked at that moment what I intended to do with it, you couldn't really say. I might have poured that water just to cool my wrists or to cool my face or my forehead, but then when you saw me take a drink and put the glass back, if you were then asked what I intended to do when I filled that glass with water, you would take all the circumstances, before I took the drink, at the time I took the drink and at the time I put the glass back, and you could conceivably arrive at the conclusion that when I poured water into that glass I did so with the intent to take a drink. You see? And that's the way we determine what a man has in his mind. We can't look into the human mind. Science hasn't progressed that far. Not yet. But some day it will. Right now we can see, we can feel, we can hear the impulse, the pulsation and the vibrations, but we can't

yet read the human mind That is why the law says you may consider all the circumstances surrounding the act itself to determine what the actor intended to do.

So, if you are satisfied, beyond a reasonable doubt, that the defendant, if indeed the defendant was one of them, with three other men intended to commit a robbery, then you may or you should inquire what is robbery.

Robbery is forcible stealing. "A person forcibly steals property and commits robbery when, in the course of commiting a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking."

It doesn't make a bit of difference how much force was used. Force is used when one raises his clenched fist and says,"give me your money or I'll smash your nose." There's the threat of the use of force. The law doesn't say a certain amount of force is required. Provided it's force which is enough and which is used for the purpose of overcoming resistance to the taking.

The District Attorney maintains that this defendant and two others entered this store. Two of them had guns, guns which are held in their hands, guns which were shown in order to indicate that force could or might be used. See, even as to that, you may employ what we call indirect evidence in order to determine what that gun was there for, indirect evidence as distinguished from direct evidence. That is if you are satisfied, beyond a reasonable doubt, that two of the three men had guns in their hands You see, that is robbery and you will consider the definition of robbery in order to determine whether or not the men were in the place for the purpose of commiting a robbery.

Then you must ask yourselves whether or not Vito Petrancosta was shot and killed during the course of the attempt to commit that robbery or during the commission of the robbery itself or while in immediate flight therefrom.

Now, as to some propositions of law, you already having been told what robbery is, and what is meant by this first count of the indictment, that is the killing of a human being during the course of the commission of a robbery, and in furtherance of the effort to commit the robbery, and to retain the

proceeds of such robbery.

Well, the District Attorney contends that Vito Petrancosta, a man of the age of 52 years, a man who was about 158 pounds and was about five feet, five inches in height, was killed; the District Attorney must prove that by direct evidence and not by indirect evidence. By direct evidence I see a thing. I look at that clock. As I see it, it is a quarter past 12. It's a little after a quarter past 12. I see it with my own eyes Vito Petrancosta. Is he dead? Did he die on July 30, 1970? Did he die as a result of the gunshot wound which witnesses say was made in his body as a result of the firing of one of the revolvers? The medical examiner was here. He testified that the deceased's son identified the body of Vito Petrancosta. He testified that the policeman first on the scene who saw Vito Petrancosta lying there dead identified the body to him.

He testified that the body was dead at the time, and he testified further that the body became dead, that Vito Petrancosta died as a result of a gunshot wound in the chest and lung

and intercostal arteries.

The District Attorney, therefore, contends that he has established by direct evidence, that Vito Petrancosta is dead and was dead on July 30, 1970, or July 31, 1970, as a result of a gunshot wound, as a result of a bullet fired into his chest, the District Attorney contends, by the man Morgan, who had a gun in his hand.

As to the manner in which all this came about, the law is that the prosecution may prove such matter by direct evidence or by indirect evidence. Now we'll come to that in just a few moments.

Let me first say that the theory of the prosecution in this case is that more than one man was involved in this robbery, and the consequent killing of Vito Petrancosta. As a matter of fact, the reference has been made to that subject by both counsel for the defendant and counsel for the People of the State of New York, the District Attorney. As I said, the prosecution, the People, have a right to move against anyone of the men mentioned in the indictment. And in this case the prosecution proceeded against this defendant.

It is not essentional, members of the jury,

that a defendant participated in each and every act necessary to establish a crime. If a defendant was acting with or knowingly aiding or assisting or collaborating with another person or with other persons towards the accomplishment of a unlawful purpose or objective, he is equally guilty with the other or the others. Such a person is a principal. Any person who is a principle in the commission of a crime is not to be judged by the degree of his involvement. If you are satisfied, beyond a reasonable doubt, that he and the others formed a common plan and purpose to commit the crime of Robbery, and knew the common and felonious intent of the other, and aided or assisted in its accomplishment, and in this case during the course of the accomplishment or the bringing to fruition or conclusion of that contemplated crime of Robbery, a person, not one of the robbers is killed, each is guilty, and it makes not a bit of difference that the defendant charged was or was not the actual perpetrator of the act which caused the death.

The act of one, under such circumstances, is the act of all who were so involved in that criminal conspiracy to commit the robbery, and each is

responsible for the others'acts committed for the purpose of bringing into a successful conclusion the common plan so long as enough is shown to justify the inference that the one or the other;that this defendant has taken some part by in any way aiding or abetting or assisting in the commission of the crime of Robbery itself.

"The guilt of the defendant, if indeed you find that he was there in the premises is not to be dependent only upon his having personally and independently committed the act." Not at all. His guilt does not depend upon any proof that he personally fired the shot. As I said, if someone else fired the shot and if you are satisfied, beyond a reasonable doubt, that the defendant was there for the purpose of aiding or abetting in the perpetration of the robbery itself, the defendant is just as liable in the criminal law as if he were the man who actually fired the shot. If he were directly or indirectly aiding or abetting another or others to commit the criminal act, even though the other or the others may have played a major roll or a more important part in its commission, he is as guilty as the other or the others.

The law does not apportion guilt nor fix a percentage of guilty conduct. It is for you to look to the facts which you consider proven and from the acts and conduct which you find from the evidence to have been proved, you may draw such inferences as a reasonable man would draw in order to determine whether or not there was a common scheme or plan to commit the crime of Robbery charged in this indictment, and if so, who was the person or the persons involved in such crime.

Let me give you just a brief illustration of what that means. If you were sitting at Philharmonic Hall up in Lincoln Center, you would undoubtedly be enchanted watching the musicians perform and listening to the beautiful music emanating from these artists. You see the pianist very busy and you see the strings and the brass and the drums and everybody chipping in, everybody collaborating in the ultimate desire which they have, to bring this beautiful sound to our ears. You see somewhere in left field someone in the corner on the land-hand side and he is standing there with two big brass things in his hand, and he's standing there just as I'm indicating, and you might say to yourself,"Well,

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what's that guy doing over there? What's he doing there? All these others are working so hard and this fellow is standing there like a graven image." And then before the music is over, once, you see this man bring those two cymbals, he brings those two objects together with a resounding clash, and that's all he does. Well, you see he's part of the team. The mucical score somewhere indicates to him that this noise which he is to make with these brass instruments must be made at that particular moment in order to bring the full beauty of the music to you, and he's only worked for about half a second. Nevertheless, he is just as much a member of the team, just as much devoted to accomplishment of the objective of the whole orchestra as the man who is using the violin throughout the entire proceeding. You see, that's what is meant by acting in concert by one aiding the other. Do I make myself clear, gentlemen?

The District Attorney, of course, maintains, as I said, that this defendant, with the others, Morgan, Ferguson, Austin, who was sitting at the wheel of the automobile, all planned this robbery, during the course of the commission of which Vito Petrancosta came to his death. That's the District

Attorney's contention.

The defendant says,"No, I didn't do it"because inherent in his plea of not guilty is the statement, "No, I didn't do it."

So, you see, you have these two positions. Now, as I said a few moments ago, in any criminal case the prosecution has the right to prove a certain fact by direct evidence or by what I like to call indirect evidence. Just what does that mean? If I were asked now what time it is, I might say half-past 12. What I see with my own eyes and describe, that's direct evidence. What I hear with my own ears, that's direct evidence. What I smell is direct evidence What I feel with my sense of touch is direct evidence. You see? The person who gives the evidence himself says,"I saw this, I heard that, I smelled this, I felt that."

Indirect evidence refers to a situation where, certain basic facts, certain things having been proven to your satisfaction beyond a reasonable doubt, and only after they have been established beyond a reasonable doubt, as I shall define those words later, you have the right to reason from such established facts towards ultimate conclusions.

Now, you see, the District Attorney is very frank to say to you that although witnesses who testified here did see three men in the store at the time Vito Petrancosta came to his death, and saw two of those men with guns in their hands, they saw one man at the safe or at the register, that is Morgan, and another man nearby, but they did not see the face of the man at the door. They saw only two faces, not this defendant.

The District Attorney has a right to establish, beyond a reasonable doubt, if he can, by indirect evidence by a process of reasoning from established facts, that this defendant indeed was one of the three men in the store. How is that done? Let me say first, that sometimes indirect evidence is stronger than direct evidence. You know, a number of men standing at four different street corners, that is one intersection, but four different corners, when called upon to describe something which they saw and something which they heard, might give four different versions of an occurrence. One's sight could be very, very sharp. He'll give one version. Another who is blind in one eye or who has no vision in one eye might give another version One who hears perfectly may

describe every sound which he heard. One who is a little hard of hearing may not. One might testify well just at the moment before the crash a big moving van went across and he obstructed his view. That all refers, of course, to direct evidence; but indirect evidence is a process of reasoning. Let me make this clearer by perhaps using other language.

" Indirect evidence is evidence which does not tend directly to prove or disprove a controverted fact, but it establishes or attempts to establish collateral or side facts from which the fact in question may be inferred as a logical or as a common sense inference."

Now again, what does that mean? Well, suppose, madam, and gentlemen, that one evening you entered your favorite social club and you walked into a private room looking for some friends, and you see a table, a usual square table that is used by card players, and you see at each side, four sides, you see an ash tray, and you see in two ash trays a cigarette down to a stub of about an inch, smoke still curling from the cigarette, and in the other two ash trays you see two fat cigars, down to about --well, if it were me it would be down to about a quarter of an inch, but

down to about an inch or a inch and a half. Smoke still curling up from those two cigars. Now, you see, if you have established to your satisfaction, beyond a reasonable doubt, that this situation existed, two cigarettes with lipstick, let me add, at the end of each cigarette, smoke curling from them, and the two cigars, smoke curling from them, if you were asked,how long ago did the people leave this room? You see, there's no evidence because nobody saw them leave the room, but you may conclude from the established facts that smoke is still curling up from the two cigarettes and the cigars, that they left not so long ago. Do you understand that, madam and gentlemen?

Now, suppose the ultimate objective to be established was whether there were men or ladies in the room, and you conclude, you reason and you conclude from the established facts, that there were two dainty cigarettes with lipstick at the end of each cigarette, and two fat ugly cigars, you conclude that there were two men and two women. Isn't that right? That's your conclusion.

And suppose you wanted to know what game they were playing and you look around and you saw a score card, one score card, and you saw two decks of cards,

and you looked at the score card and you saw the word "Vulnerable", and underneath vulnerable, and underneath another column you see figures, numbers, and you see additions, if you were asked what game they were playing, you would conclude that they were playing Bridge, because the word vulnerable is not used in a Pinochle game or in a Gin game, or anything like that. So, you see, madam and gentlemen, it is a process of reasoning from facts which are established beyond a reasonable doubt. Then you reason from those facts to arrive at the ultimate conclusion.

Now, suppose you lived in one of these apartment houses, or perhaps undoubtedly, as some of you do, and you're looking out of the sixth floor apartment and the windows face on the street and you look out at night, just before going to bed, and everything is nice, clear, and everything is dry. The street is nice and clear and dry and so are the houses and the trees are dry, and you go to sleep and you get up at 7 o'clock in the morning and you look out of the window, and you look down into the gutter and you notice the gutter is wet, and part of the sidewalk is wet. Now, if you stop right there and were asked first, what happened, did it rain? You can't come to a conclusion that it rained because the --well, what we used to call the street cleaning department in

the good old days, this watering wagon would come along the street and spray the whole gutter and everybody was standing on the sidewalk. So, you couldn't really conclude that it was raining because it may have been the Sanitation Department which came along and sprinkled water all over the gutter and part of the sidewalk.

But suppose you looked further and you looked across the street and you saw the rooftops all wet and you saw the sidewalks wet and you saw rivulets running down the roadways all wet and you saw water dripping from the branchs of trees, then if you were asked what happened, you might conclude that it rained. You see, because that situation would exclude absolutely any idea that the Sanitation Department or the street cleaning wagon came along and watered not only the streets but the rooftops as well. Do you understand that, madam and gentlemen? That is what we mean when we talk about indirect evidence, reasoning from the established facts towards an ultimate conclusion as to the question which is asked.

So, now you see what I'm attempting to make clear is that evidence which is indirect may, by a process of reason from established facts, collateral facts, may prove the very thing which points to

the solution of the ultimate problem.

In the one case, what game were these people playing? Or, were they men or women sitting there? In another case, did it rain? When did it rain? You remember going to sleep at 11 and everything nice and clear, and getting up at 7 in the morning, wet everywhere, you conclude naturally that it rained somewhere after you went to sleep and before you got up in the morning.

Now, the law imposes certain requirements before you may consider indirect evidence, and one is, that the facts from which the question at issue is to be inferred must be proven to your satisfaction beyond a reasonable doubt.

In other words, you may never base an inference upon another inference, because indirect evidence consists in reasoning from facts which are known or which have been proven to do what? To establish such facts as are inferred or concluded to exist in our common knowledge and experience. Such facts must be based upon matter which was established to your satisfaction beyond a reasonable doubt by direct proof and not upon any assumption, guess or inference.

That simply means this, the illustration as to

the situation which confronted you in your social club. You can't guess that there is lipstick at the end of each cigarette. You must establish, as a fact, that there were red markings around the end of each cigarette You must not guess that smoke is curling from the cigarettes. You must be satisfied in your own minds, beyond a reaaonable doubt, that smoke, indeed, is curling from the cigarettes.

You must not guess that there are two cigars in the other ash trays, you must see them, and be satisfied, beyond a reasonable doubt, that they were there. Then you draw inferences. You reason logically from these established facts towards the ultimate conclusion. What was the sex of the persons? What game were they playing? How long ago did they leave? Was it yesterday they played? Of course, it couldn't be yesterday, there is smoke still coming from the cigars and cigarettes.

There are two other rules which the law says must be observed on the point of circumstantial evidence. The first is that the inference you draw of guilty should flow naturally from the facts proved by direct evidence, and must be unnatural, nault of the facts directly proved as I have indicated or

as I have illustrated, and should be consistent with all of such facts. The direct evidence must exclude to a moral certainty every supposition except that of guilt of the accused. In other words, the facts which are directly proved must be not only consistent with guilt of the accused but must also be inconsistent with his innocence.

You must, keeping in mind the rules I have outlined, first determine what collateral facts have been proved to your satisfaction beyond a reasonable doubt. Then, under the same rules, you must determine whether the total effect of all of the circumstances directly proved persuade you, beyond a reasonable doubt, that the defendant is guilty.

In this case, madam and gentlemen, it is the District Attorney's contention that he has established, beyond a reasonable doubt, certain facts. First, he says he has established, beyond a reasonable doubt, that there was a robbery. Second, he contends that he has established, beyond a reasonable doubt, that there were three men involved in that robbery. One at the cash register, one nearby and another at the door, and that two of those men had guns. Three, he contends that he has established, beyond a reasonable doubt, that the man at the cash register shot and

killed Vito Petrancosta. Four, it is his contention that he has established, beyond a reasonable doubt, that three men ran out of the store after the killing of Vito Petrancosta, both two of those three men carrying guns. He then, number five, contends that he has established, beyond a reasonable doubt, that one of the three men, all three running down the street, two with guns in their hands, got into an automobile and were captured. Six. He contends that he established, beyond a reasonable doubt, from the testimony of police officers, that this defendant was one of the three men running down the street and that this defendant had a gun. Seven. He contends that he established, beyond a reasonable doubt, that this defendant fled with the other man and that he and the other man were pursued by police officer Walsh, and that after a chase, police officer Walsh captured the other man, and that this defendant escaped.

The District Attorney contends further, and this is the circumstance which you may consider in the limited way or to the limited extent as to which I shall charge you very shortly, that the defendant fled, did not return to his home, absented himself from his home and that he was not found by police

officers, particularly Detective Marshall, at other places in Brooklyn, and in Queens until he was arrested nine months after this incident.

The defendant says no, that's not so. The defendant contends inherrent in his plea of not guilty, "I was not in that store. I wasn't there. I never ran down any street. I never had any gun. I was never the objective of a chase by a policeman. I never voluntarily absented myself, in other words, because I was conscious of guilt or anything like that. Not at all," says the defendant.

So, you see you have the two platforms upon which they stand. The District Attorney on one, the defendant upon the other.

Now, I said to you that I would charge you as to what the District Attorney calls "flight of the defendant." Madam and gentlemen, the conduct of an accused such as flight or attempted flight is always a proper subject for the consideration of a jury as indicative of a guilty mind and in determing the question of the guilt or innocence of the person charged. Such evidence may be considered under the law if there are facts pointing to the commission of the crime charged as to the motive which prompted such flight. Such

evidence is admissible on the theory that an inference of guilt may be drawn from acts which indicate a consciousness of guilt. The District Attorney maintains that this defendant fled, as I have already told you and I have outlined his contention with respect to efforts to arrest the defendant.

Such evidence, members of the jury, standing alone and with nothing else, is insufficient to warrant a verdict of guilty. It must be supported by other proof of the defendant's involvement in the alleged robbery and killing of a substantial character. Here the District Attorney maintains that the other proof lies in the testimony which he has submitted of witnesses who were in the store and who described the three men to the extent that they said two of them had guns. The District Attorney maintains that such other proof lies in the testimony of police officer Walsh, that is, he saw the defendant, gun in hand, with another man, gun in hand, and a third man running along; that when they gave chase, one of them got into a car and was apprehended, and as I said, the other two, including this defendant, ran and that this defendant, during the course of such chase, threw

the gun which he held in his hand underneath an automobile or between two parked automobiles.

And so, you see, madam and gentlemen of the jury, it is the District Attorney's contention that by reasoning from the established facts in the case, without recounting, without going over those established facts, which, incidentally, the defendant says or claims are not established facts beyond a reasonable doubt, but drawing inferences from those established facts, the conclusion is irresistible, says the District Attorney. The conclusion flows freely and smoothly and logically to the ultimate conclusion that this defendant was one of the three men in the store at the time of the perpetration of the robbery, and at the time of the shooting of Vito Petrancosta, and that those circumstances, reasoning from such established facts, claims the District Attorney, exclude to a moral certainty every other hypothesis, save that of the guilt of this defendant. Such is the contention of the prosecution.

The defendant, by his plea of not guilty in this case, denies in toto the contention or the contentions of the District Attorney.

Now, I will not be much longer But of course, members of the jury, there were two police officers

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in this case who testified that it was this defandant they saw among the three who were running down the street.

I must charge you, as I do now, that counsel for defendant talked about these police officers being professional witnesses, and the District Attorney implied that they are, indeed, professional witnesses to the extent that they are trained to observe. You may consider the fact that they are police officers who gave this testimony.

Police officers testified that this defendant, indeed, was one of the three men. Officer Walsh testified that he followed this defendant for a considerable distance, going after him, running him down into a place which was called an A & P, the defendant and the other man getting in there and the police officer going after them, and the defendant getting out the back way and jumping over a fence, and disappearing; and the police officer Walsh testified that he apprehended the other man.

Of course, you must be satisfied in your own minds, beyond a reasonable doubt, that the police officers or the police officer, the testimony of both of them or one of them is accurate as to this

defendant

You see, when there is a question of identification, you must ask yourselves, "Are the identifying witnesses truthful?" You must consider whether a witness who makes an identification is swayed by any motive to testify to anything but the truth, no matter who it helps or hurts, or whether his testimony is warped by any possible bias or interest in the outcome of the case. And so, you are to apply carefully to these identifying witnesses the same stress as to credibility as you would to every important witness in the case. You must consider all the circumstances under which the identifications were made.

You must consider first the powers of observation of the witness who makes the identification. Was he able to see? Was his eye sight good? Did this happen in the day time or the night time? The District Attorney contends that the proof establishes that this happened about half-past six in the evening, in daylight saving time, in broad daylight, so said the witnesses, in daylight. You have a right to consider whether it was light or dark. You have a right to consider how close the police officer or

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the police officers got to the defendant, whether they saw the defendant's face, and you have a right to consider the testimony, and it is for you to determine whether to believe it, of the police officer or officers, that the defendant turned around about five times, the first time when they ran, turning and looking the police officer squarely in the face. You have a right to consider all of that, to determine whether or not you will accept the testimony of the police officers as to the identification of this defendant.

You have a right to consider,, and you should consider everything about the case as to the lapse of time between the date of the occurrence, and the date of the arrest; of the powers of the police officer to remember all of these things, you have a right to consider.

You have a right to consider any impression that the face of this defendant, if indeed it was the defendant who was chased by the police officers, made upon the police officer or the police officers. And in sum, gentlemen, it is your right to take into account everything about the testimony of officer Walsh and Officer Scannapieco as reflecting

upon their ability to observe and their opportunity to observe as they testified.

If you are satisfied, beyond a reasonable doubt, that this defendant is indeed the man who was seen running with the other two, and that he was indeed one of the men who was chased by the police officer, then you may accept as truthful that version of the testimony of the police officers with regard to their identification of this defendant as the man who was running, gun in hand, with two other men from the direction of the store where Vito Petrancosta came to his death.

Now, gentlemen, we are just about concluding and I will charge you on the law of reasonable doubt under a law which existed before September.

Under a law which existed before September 1, or before a month and a half ago, the Judges marshalled the evidence and spoke about the evidence. I'm not going to do that because during my charge I commented upon testimony in order to make clear certain concepts of our law as to which I was obliged to and did charge you.

You will remember the testimony. It was all

submitted to you in a very short space of time which does not, of course, make the case less important. Not at all, madam and gentlemen. This case is important. I must give you all the law which applies to the case which is before you for solution.

You've heard all the witnesses. Members of the jury, it is for you, and you alone to determine whether the witness is truthful,did they testify truthfully? Were they hiding anything? Were they holding anything back? Were they laying anything on? Were they taking anything off? That's for you gentlemen to determine.

Of course, should you find that any person is an interested witness, that is interested in the outcome of the trial, you have a right to consider such testimony as testimony coming from an interested person. That does not mean that an interested person would lie. Not at all. An interested person may just as readily tell the truth and may just as readily lie as one who is indeed interested.

If you are satisfied, beyond a reasonable doubt, that a witness or witnesses in this case testified only as a truthful man should testify, if you are

satisfied, beyond a reasonable doubt, that the witnesses told the truth, even though they had some interest in the outocme of the trial, then of course you should accept that testimony.

If you are satisfied, of course, that the witnesses or a witness lied or did not tell the truth, whether he is interested or disinterested, it is your right to reject such testimony which you find to be untrue.

If you find that any witness testified wilfully, falsely,as to any material issue in this case, you may, if you wish to, reject all of the testimony of that witness or you may accept such part of that testimony which you believe to be truthful and you may reject that part of the testimony which you believe to be untruthful.

Now, I'll caution you that what I said, it is not my recollection of the testimony of the witnesses, or the recollection of Mr. Lombardo or the recollection of the District Attorney, it is your recollection which controls and only your recollection.

Now, before I conclude, do you remember I talked with you about the words, beyond a reasonable doubt?

Now, you see, beyond a reasonable doubt means just that, and again like with the word intent or intention, sitting around somewhere out of the courtroom,I asked you what it meant, your eyebrows would arch up and wondering what kind of an idiot I am. We know what that means but in law it has an altogether different connotation or significance. You see, first of all the law does not say beyond a doubt. Not at all. Not for a moment. If anyone should say in deliberations,"I have a doubt', that is not enough. You must then ask yourself or yourselves, is this a reasonable doubt? That's what the law is. You see, those words,reasonable and doubt, go together,too. We never in law in a criminal case say "in doubt." We always say "beyond a reasonable doubt." Like the popular crooner in the song,"Love and marriage", you can't have one without the other. You can't. Must be both words together, beyond a reasonable doubt.

Now, what is a reasonable doubt? Well,let me first tell you what it isn't. A reasonable doubt is not some silly, non-sensical foolish doubt, not the kind of a doubt for which one can't give a good reason, not at all. A reasonable doubt is not a guess, it is not a surmise, it is not a speculation that the

defendant may not be guilty. That's not what is meant by reasonable doubt.

A reasonable doubt, members of the jury, is such a doubt as a reasonable man may entertain after a careful and honest review and consideration of all the evidence in the case. It is a doubt for which some good reason can be given. A reasonable doubt is an actual doubt that you are conscious of after going over in your mind the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty, and believe that you are acting in a reasonable manner, and if you believe that a reasonable man in any manner of like importance would hesitate to act because of such a doubt as you are conscious of having, that is a reasonable doubt of which the defendant is entitled to have the benefit.

Of course, the words, beyond a reasonable doubt do not mean beyond all possible doubt. The prosecution is never required to prove the defendant's guilt with mathematical certainty, nor is the prosecution required to prove by absolute and positive proof that it is impossible for the defendant to be

innocent. Such degree of certainty is rarely attainable in the administration of justice. Guilt must be established only beyond a reasonable doubt and not beyond all possible doubt. And gentlemen, you must not resort to the use of the words, beyond a reasonable doubt only for the purpose of avoiding the doing of a disagreeable duty.

Now, gentlemen, I am about to close. You must understand that under the law in the State of New York, a verdict to be effective must be a unanimous verdict. As I speak now, I wish the clerk of the Court would give the foreman a pad and a pencil, if the foreman does not have a pencil or a pen, so that he might make such notes with regard to a possible verdict in this case as might be helpful to you during your deliberations in the jury room.

Plaase understand, members of the jury, that in the administration of our criminal law, a fair and impartial trial are a fundamental requirement, and when I say a fair and impartial trial, I do not mean the kind of fairness which is prevelent in a sporting event. It's not a matter of sportsmanship. It's the kind --or let me say a defendant has a fair and an impartial trial when jurors adhere to their oaths that they will well and truly try the issues

in this case upon the evidence and upon the law as I have given you the law. That gives both sides a fair and impartial trial.

Please understand that the state surrounds the accused with in any criminal case, and in every criminal case with certain constitutional safeguards to which I have made reference. But the state also guards most zealously the rights and property and safety and well being of all the people, regardless of race, color, creed or station in life. Please understand, members of the jury, that while an innocent man must not be convicted, neither must a guilty man be acquitted. The obligation weighs with equal responsibility upon you to convict the guilty as it does to acquit the innocent, and therefore, whatever your verdict will be, see that it is an intelligent verdict coming within the confines of your oath; see that it is a verdict based upon the evidence, based upon such reasonable inferences as a reasonable and prudent man might draw from established facts without prejudice and without sympathy; with a scrupulous application of the law as I have given you the law.

If you render that kind of a verdict, then, members of the jury, you satisfy your requirement

of your oath as jurors.

Now, I believe that I have charged on every subject which I should have covered. In view of what I said, remember I said I do not read my charge. There are certain technical portions of the charge which I must read. However, in my own dissertation, it may be that I neglected or overlooked advising you as to a certain point or points which I should have covered. For that reason, members of the jury, I'll ask you to leave the courtroom at this point. Do not go to your jury room, it is downstairs. Well, that's too much time. If there is a courtroom vacant, and I think there is next door, just go into the courtroom, and you'll have privacy there, and I assure you I will not be long. Should I want you to return to the courtroom so that I might give you additional advice, the courtofficer will escort you back into the courtroom. However, should it not be necessary that you return to the courtroom, the court officer will then take you to your jury room,where I understand lunch is being served, and you will begin your deliberations. You might deliberate while you're having luncheon, so long as you are locked into the jury room and so long as no unauthorized person is in

the jury room. As to the three alternate jurors, gentlemen, do you want them to remain or would you prefer that they be excused?

MR.SCHMIER: May we approach the bench?

THE COURT: Yes.

(OFF RECORD DISCUSSION AT THE BENCH)

THE COURT: I am reminded I chopped something off at the beginning. There was a reason I asked the clerk of the court to give the foreman a pad of paper. There are cases where a possible verdict is somewhat involved, but I don't think it is necessary, upon consideration, that any notes be made by the foreman, for the benefit of the jury with regard to any prospective verdict for the reason that I've considered one count to the jury, that is the count which we lawyers refer to as the felony murder count.

The first count of the indictment charges the defendant with the crime of Murder. Murder, committed during the course of a commission of a robbery or an attempt to commit a robbery and in furtherance of the commission of the robbery itself. If you are satisfied, beyond a reasonable doubt, that the defendant is guilty, your verdict will be guilty. If you have a reasonable doubt as to any of the essential elements of the crime as I have defined the essential elements of the crime,

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then your verdict will be not guilty.

Now,Mr.Foreman and members of the jury, if you will just remain in the adjoining courtroom for a few minutes, counsel may want to suggest something else. Do not begin discussion and do not talk about the case yet. Not until the Court officer looks you into the jury room.

(JURORS EXCUSED AT 1:15 P.M.)

THE COURT: Are there any exceptions?

MR. SCHMIER: I have no --I'll make it in a form of a request to charge. I have no exceptions.

THE COURT: Any requests?

MR. SCHMIER: Yes, Judge. Ordinarily I would not ask you to review anything, but you made a point out of in flight, outlining six contentions which the District Attorney had as having been proven beyond a reasonable doubt, and then you said from those the District Attorney is asking you to draw indirect evidence. Do you recall?

THE COURT: Not only that, but I also referred to the flight from the store, that is from the proximity or the direction of the store.

MR.SCHMIER: Judge, believe it or not, in the six, I would trade the six for the one that you left out.

My number one point is that I proved, beyond a reasonable doubt, from the lay witnesses, as Mr.Lombardo calls them, that Morgan and Ferguson were in the store.

THE COURT: I told that to the jury.

MR. SCHMIER: Oh, no, not in the store. You said that they --

THE COURT: (Int'g)I said Morgan was the man with the gun at the cash register : who fired the shot and killed the deceased, and the other man was nearby.

MR. SCHMIER: And they identified him as Ferguson. He was identified as Ferguson.

THE COURT: The jury has all that.

MR. SCHMIER: But you didn't mention Ferguson, and then --all right. I'll withdraw that.

THE COURT: I don't think it is necessary.

MR.SCHMIER: It is not that necessary.

THE COURT: Any exceptions.

MR. LOMBARDO: Yes, your Honor. I have just one exception. I except to that portion of your Honor's charge wherein you charged the jury on the question of flight.

THE COURT: Yes.

MR.LOMBARDO: I'm coupling this with the objections that I made during the trial, to any testimony in the case on flight.

THE COURT: I understand.

MR. LOMBARDO: And because of that I respectfully except to that portion of the charge.

THE COURT: Your exception is noted.

MR.LOMBARDO: Thank you.

THE COURT: Do you have any requests or charges?

MR.SCHMIER: No.

MR.LOMBARDO: I have just one request, your Honor. I would respectfully request your Honor to charge this jury that if they have a reasonable doubt as to the indentification of this defendant, based upon the testimony of Office Scannapieco and Walsh, that they must acquit him.

THE COURT: Didn't I tell them that?

MR.LOMBARDO: I dont think your Honor said it quite in that fashion.

THE COURT: We're guilding the lilly and we're belaboring the point. I said it is for them to determine whether or not the testimony of the police officer, with reference to identification, was accurate.

MR. SCHMIER: Your Honor, I could even go further and perhaps your Honor --I would stress to your Honor that you made a specific point out of the fact that standing alone, they could not convict on flight.

THE COURT: Yes, yes.

MR.SCHMIER: They must find, beyond a reasonable doubt, the independent evidence of identification. You said it so clearly.

THE COURT: Defendants never accept the things which they get in the form of a windfall, something which judges don't usually charge.

MR. SCHMIER: I remember that very clearly.

THE COURT: This was gratuitous on my part, Mr. Lombardo. I don't mind telling you because I feel keenly on that. Evidence of flight alone isn't worth the paper upon which you might write the meaning of the word flight. There must be some other evidence.

MR.LOMBARDO: Your Honor is, I gather, denying my request?

THE COURT: Yes.

MR. LOMBARDO: I respectfully except.

THE COURT: Mr. Lombardo, I want to tell you, and I said it at home last night, that's the most wonderful thing in the world, and it is a rare treat to have this type of lawyer in the courtroom. We're treated to spectacles here which are outrageous, which make our blood run cold, the way some lawyers try cases. But seeing a man like you and Mr. Schmier, it was really a pleasure. It was really a pleasure, and I enjoyed this trial immensely.

MR. SCHMIER: Getting back to realities. We did not make a definitive conclusion as to the alternate jurors. We talked about it.

THE COURT: I just want to add one thing Mr. Schmier was so fair that he bent backward; in certain things which he might have done, he didn't. And I did not attribute that to the milk of human kindness which flows as copiously from Mr. Schmier as the ketchup that they advertise takes about half an hour for a drop to come out. Yes?

MR. SCHMIER: What are we going to do with the alternates.

THE COURT: Off record.

(OFF RECORD DISCUSSION)

THE COURT: On the record.

MR. LOMBARDO: I think they should be kept together.

MR. SCHMIER: I think they should be excused.

THE COURT: He wants them kept together.

MR. LOMBARDO: The three jurors should be kept together.

THE COURT: As I read the new statute on the subject --what we had before was a matter of decision of law. This is codified now. Have the alternate jurors, three alternate jurors have their lunch in

another place, another jury room. All right. They may begin to deliberate.

MR.LOMBARDO: I didn't mean together with the jury of twelve.

THE COURT: No, they must never be in the jury room. They are entitled to see anything --

MR. LOMBARDO: (Int'g) I have no objection to their seeing any exhibits they ask to see.

THE COURT: All right.

MR.SCHMIER: Judge, just to get my thinking clearly. Don't I recall that the only evidence in the case is the gun?

THE COURT: That's right.

MR. SCHMIER: Now, it is not customary to send the gun in.

THE COURT: We'll take the bullets out.

MR. SCHMIER: I have no objection to them seeing it.

THE COURT: I don't care whether it is customary or not. An unloaded gun, I know plenty of people have been killed by unloaded guns, but the Court officer will make sure that there is no ammunition in the gun, and then the jurors can see it. Defendant is remanded.

(COURT RECESSED AT 1:15 P.M.)

(AT 2:30 P.M. THE FOLLOWING OCCURRED)

(ALL JURORS RETURNED TO THE COURTROOM. DEFENDANT PRESENT. BOTH SIDES PRESENT)

THE CLERK: All jurors present. Defendant present with counsel. The District Attorney is present.

THE COURT: Good afternoon.

THE CLERK: Judge, I stated for the record. All jurors present. Defendant present with counsel, and D.A. is present.

THE CLERK: Gentlemen, the Court isin receipt of the following communication, dated 10/13/71. Robert Gelb, foreman. "Request testimony of Sam, owner of the store; Michael, son of the deceased. Walsh and his partner."Signed "Robert Gelb, jury foreman."

Well, gentlemen, you remember, I referred to the new criminal procedure law which went into effect September 1, which provides that a Judge need not marshal the evidence in the case. Under the old law, a Judge was required to marshal, present the highlights. I didn't marshal the evidence in this case, although I had a right to for the simple reason that it took such a short period of time to present all of the testimony, and I thought that the jurors paid close attention to the testimony.

Evidently, is there a specific point that you want or do you want all the testimony read?

THE FOREMAN: All.

JUROR # 6: We would like all the testimony read back.

THE COURT: Are you ready with all the testimony?

(AT 3:05 P.M., ALL TESTIMONY, AS REQUESTED WAS READ BACK BY THE COURT REPORTER, AT WHICH TIME THE FOLLOWING OCCURRED)

THE COURT: All right, gentlemen, you may return to your jury room and continue your deliberations.

Defendant is remanded.

(AT 3:20 P.M. THE FOLLOWING OCCURRED. ALL JURORS PRESENT. DEFENDANT PRESENT WITH COUNSEL, AND D.A. PRESENT)

THE CLERK: Jurors, please answer to your names.

(ROLL CALL OF JURY TAKEN)

THE CLERK: All jurors present. Defendant present with counsel. And the District Attorney is present.

Members of the jury, have you agreed upon a verdict?

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THE FOREMAN: We have.

THE CLERK: Rise, Mr.Foreman. With respect to the charge of Murder, what is the jury's verdict, guilty or not guilty ?

THE FOREMAN: Guilty.

THE CLERK: Be seated. Members of thejury, you say you find the defendant guilty of Murder, and so say you all?

(ALL JURORS ANSWER "YES")

MR.LOMBARDO: Your Honor, may I reserve motions until sentence.

THE COURT: Beg your pardon?

MR.LOMBARDO: May I reserve motions until sentence?

THE COURT: Yes. Motions are reserved.

MR. LOMBARDO: Will you have thejury polled?

THE COURT: Yes.

THE CLERK: Listen to your verdict as it stands recorded. You say you find the defendant guilty of Murder. Juror number 1, Robert Gelb, is that your verdict?

MR. GELB: That is.

THE CLERK: Juror number 2, Murray Appelbaum, is that your verdict?

MR. APPLEBAUM: Yes, it is.

THE CLERK: Juror number 3, is that your

verdict?

JUROR # 3:Yes, sir.

THE CLERK: Juror number 4, Olma Tinson, is that your verdict?

MRS.TINSON: Yes, it is.

THE CLERK: Juror number 5, Eugene O'Neill, is that your verdict?

MR.O'NEILL: Yes, sir.

THE CLERK: Juror number 6, is that your verdict?

JUROR #6: Yes.

THE CLERK: Juror #7,John Mamson, is that your verdict?

MR.MAMSON: Yes.

THE CLERK: Juror #8,Victor Krumholds, is that your verdict?

MR.KRUMMOLDS: Yes.

THE CLERK: Juror # 9, Anthony McCarthy, is that your verdict?

MR.MC CARTHY: Yes.

THE CLERK: Juror # 10, Joseph Areno, is that your verdict?

MR.J ARENO: Yes, sir.

THE CLERK: Juror # 11, Thomas Dougherty, is that your verdict?

MR.DOUGHERTY: Yes, sir.

THE CLERK: Juror # 12, Robert Masselman, is that your verdict?

MR. MASSELMAN: Yes, sir.

THE CLERK: The verdict is affirmed.

THE COURT: All right. Gentlemen, sentence will be imposed on or before November 9 --sorry.

THE CLERK: The second Monday is November 8, in November.

THE COURT: Veterans Day.

MR. SCHMIER: October 25.

THE COURT: They have legislated different birthdays.

MR. SCHMIER: There's a new law, your Honor.

THE COURT: All right. November 8.

THE CLERK: November 8 is the second Monday in November.

THE COURT: All right. November 8, or prior to that date, for sentence.

Now, Mr. Foreman, and gentlemen of the jury, and let me address myself to the alternates as well. It is with a great sense of appreciation that I discharge you from further service as jurors.

THE CLERK: They have to return to Central Jury first now.

THE COURT: Or at least you are discharged from

any services in this case. This case is concluded now, except for sentence, which will be imposed by me. You have nothing to do with the sentence and that undoubtedly relieves jurors, because they're concerned only with the factual matter.

Gentlemen, have no compunction about the verdict. Because you see, this is a type of a case in which the District Attorney admits, as he did here, that no one ever identified the defendant as being one of the men in the store. However, that proof may be offered by means of what we call indirect evidence, which sometimes is much stronger than direct evidence. In any event, it is as good in a court of law as direct evidence. And I think you understood, because I tried to make it very clear by illustration how you have established facts, and then you reason from those facts. Evidently, you did reason from the facts, and you arrived at a conclusion as to which you need have no compunction whatsoever.

This is the way our law works here, and it is the best system in the world. In other countries, a man is presumed to be guilty at the very beginning. We have the accusitorial system where the defendant is questioned and cross questioned, and he's put to the rack, and there is no burden on the part of the

prosecution to prove guilt beyond a reasonable doubt. In certain countries it is the other way around. Defendant must prove his innocence. Here, by this process of direct-examination, cross-examination, it is intended to and does bring about the result that every bit of information which is relative to the issue that confronts you is literally squeezed from a witness. All within the framework of the rules of evidence and procedure. So, gentlemen, without further adieu, the Court sincerely appreciates your efforts in this case and you may return to Central Jury, and perhaps they will discharge you from further obligations as jurors. I think they will.

Defendant is remanded.

(PEDIGREE TAKEN)

(DEFENDANT REMANDED)

THE COURT: Let me say one thing further, gentlemen. You notice how this trial was conducted. It is unfortunate that there are courts of law where everything lends itself, and I regret so much to say where everything lends itself to disorder. Confusion. For not only defendants but some lawyers all lend themselves to an effort to create confusion and disorder, which is charitably described as disruptive tactics in a courtroom.

***

happened here. And see, I've said so many times, and say it again, it was really a thrill, and for a moment last night, I caught myself hoping that this case would continue for a week or two or a couple of months, for that matter. But, Mr. Lombardo and Mr.Schmier, I want to express to you again my great pleasure.

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Certified to be true and correct

Florence S. Campagna, C.S.R.
Official Court Reporter

SENTENCING MINUTES

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM PART 13

Stens 5722B
Appeal 9226

PEOPLE OF THE STATE OF NEW YORK, : Ind. #3853/'70

-against-

ROBERT RICKENBACKER, :

Defendant. :

January 20, 1972

BEFORE:

HON. MICHAEL KERN
Justice

APPEARANCES:

PETER LEAVITT, ESQ., A.D.A.,
For the People

JOSEPH LOMBARDO, ESQ.,
For the Defendant

FLORENCE S. CAMPAGNA, C.S.R.
Official Court Reporter

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THE CLERK: What is your name?

DEFT. RICKENBACKER: Robert Rickenbacker.

THE CLERK: Is Mr. Joseph Lombardo, who stands beside you, your attorney?

DEFT. RICKENBACKER: Yes.

THE CLERK: Is there any legal cause or any other cause to show why judgment of the law should not be pronounced upon you at this time?

DEFT. RICKENBACKER: No.

THE CLERK: Are you ready for sentence today?

DEFT. RICKENBACKER: Yes.

THE CLERK: The People have a right to be heard relative to your sentence. You may personally speak to the Court, and of course, your lawyer may speak to the Court. Do the People wish to be heard relative to the sentence of Robert Rickenbacker?

THE COURT: Do the People want to be heard in this case?

MR. LEAVITT: No, your Honor, no request to be heard.

THE CLERK: Robert Rickenbacker, you may speak, your attorney may speak, or you

may both speak. Do you wish to personally speak to the Court?

DEFT. RICKENBACKER: No.

THE CLERK: Mr. Lombardo?

MR. LOMBARDO: If it please, your Honor, I'm aware of the fact that this case was determined by a verdict of the jury. It was a comparatively short case and I know your Honor has a full and complete report. However, at the conclusion of the case, your Honor graciously allowed me to reserve the right to make motions to set aside the verdict at the time of sentence, and I move your Honor to set aside the verdict in this case on the ground that it is contrary to the facts, contrary to the law, contrary to the evidence, contrary to the weight of the evidence, and I particularly rely upon two points, your Honor. One is the issue of identification. The testimony of the identifying witnesses was that they were pursuing several defendants and that the chase, as I recall the testimony, lasted between three and four minutes, and that at five different occasions, turning five

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different corners, the pursuing officers lost sight of the defendant whom they testified that they identified. Officer DiPietro said that he saw him once, and I'm referring, of course, to this defendant, and the other officer, I believe was Officer Walsh, testified that he pursued him for approximately six, seven blocks, and they turned some five corners and he lost sight of him on five occasions. That is point number one on the issue of identification.

However, there is a further point upon which I wish to predicate this motion, and the testimony of Detective Marshal was that after he had arrested defendants who admittedly were at the scene of the crime, he spoke to them and then he went looking for the defendant, Nickenbacker.

In effect, what was being offered here by the prosecution, was testimony by an admitted accomplice without any opportunity for the defense to cross-examine him, and I believe that was done in violation of the Bruton Rule.

THE COURT: Mr.Lombardo, is it your contention that I permitted testimony of a hearsay nature during a trial?

MR. LOMBARDO: Your Honor, the testimony, it wasn't quite that simple. It was a very sophisticated manner in which it was done, and I imply no criticism of your Honor.

THE COURT: Well, Mr. Lombardo, I ought to be severely critisized if I permitted a violation of such a basic rule. My understanding was that the police officer, from the very moment, saw the --as they emerged from this store, saw the three men running, saw one or two get into a car. I don't remember the other defendants. I don't know what happened in that case. I'm only concerned with this defendant. This defendant was tried. What happened to the other case?

MR. LOMBARDO: One was in the car, and one ran into the car, and two ran away.

THE COURT: Are those cases disposed of, by the way?

MR. LOMBARDO: Yes, your Honor.

THE COURT: Not before me?

MR.LOMBARDO: Oh, no, sir.

THE COURT: Now, this case came to trial before me.

MR. LOMBARDO: Correct.

THE COURT: The police officer testified, if I remember correctly, two of them, that they saw this defendant running, gun in hand. At least one of them testified that he kept chasing the defendant, and I think there was something, that he went around the corner into a super market area.

MR. LOMBARDO: That was the last phase of the chase, your Honor.

THE COURT: He apprehended the defendant.

MR. LOMBARDO: He did not apprehend this defendant. No, this defendant was apprehended some nine months later. But there was evidence of flight, your Honor. In an attempt to show flight, the District Attorney elicited fromofficer --from Detective Marshal, that after he had these other defendants in custody, he then went looking for defendant Rickenbacker without any absolute --without any testimony from

anyone that they knew who Rickenbacker was, and the inference was inescapable, your Honor, that at lease if I were sitting on the jury, I would have gotten that impression that Detective Marshal had questioned the other three defendants, and they had told him that Rickenbacker was the fourth man, and they immediately went looking for Rickenbacker, and the testimony was they went to the Times Plaza Hotel, they went to a garage, they went to the home where he lived.

THE COURT: Mr. Lombardo, did the detective testify on the witness stand, in the trial, that the other defendants told them that Rickenbacker was the other man?

MR. LOMBARDO: No, your Honor.

THE COURT: That never came before the jury?

MR. LOMBARDO: No, your Honor, that did not come before the jury. That's why I say it was done in a very sophisticated manner. Unfortunately, your Honor, there was some question about whether or not we could get the minutes in the course of the trial, and

the decision was made that we didn't require the minutes. So, I can't point it out to your Honor, but I say to your Honor, my recollection is absolutely accurate as far as I can relate on the question of the officer who chased this man, lost sight of him five times. There were four corners turned. There were, apparently, four people implicated in this crime; one was in an automobile, three ran out of the store, and they ran to this vehicle. One got into the vehicle, at which time they were apprehended by the police. Then, two ran away. Officer Walsh chased the defendant.

THE COURT: Both officers identified this defendant as one of the men running away.

MR. LOMBARDO: Right.

THE COURT: This defendant, gun in hand.

MR. LOMBARDO: Yes, your Honor. And there was another point that I made. There was absolutely no testimony of any finger-prints of this defendant on that gun. The testimony of the police officer who chased

the two men that ran away was that one of them whom he said was the defendant, threw a gun underneath a parked automobile The gun was recovered. There was absolutely no testimony about any fingerprints on that gun, and mind you now, this was within a matter of seconds after the gun had supposedly left the hand of this defendant.

But even more important than that, your Honor, is the fact that the police officer, Walsh, captured one of the men. The other man, whom he said was this defendant, got away, was not arrested until nine months later.

The record will bear me out, that Detective Marshal testified that --mind you now, three defendants, two were caught practically at the scene of the crime, and the third one was picked up by Officer Walsh in the course of the chase. He said that when they got to the police station, he then went looking for Hickenbacker, but there was no testimony as to how he knew that Hickenbacker was the fourth man. I repeat,

the conclusion is inescapable, your Honor, that the jury would get the impression that these three men said Rickenbacker was the fourth man. Since these three men were accomplices, in effect what was be ng done here was to use the testimony of an accomplice without the right of cross-examination offered to the defense in violation, I say, of the Bruton Rule. I repeat, that is no reflection on your Honor, and it isn't meant to be, but I'm simply here doing my duty.

I realize that there will probably be an appeal in this case, I think the Appellate counsel, in this case, should have the benefit on the record of my recollection, and thoughts about this case. I repeat, there is certainly nothing in what your Honor said, nor did I insinuate or did I think that your Honor would allow that testimony.

THE COURT: Mr. Lombardo, I wouldn't even indirectly attribute anything like that to you. Of course not. You have a perfect right to find fault with rulings

made by a judge. You have a perfect right to critiaize what a judge did, that you believe should not have been done. That is well within your rights as the good attorney that you are. There is no doubt about that. I am not taking any offense at all. As a matter of fact, the motion that you are making now is the kind of motion that a real lawyer would make, and you have given this defendant the kind of a defense and the kind of representation that he couldn't pay, that he couldn't possibly pay for, and I know you get nothing for this, unless we talk about a big $500.00 or $750.00 as compensation paid for by the tax payers.

Well, your motion is denied, Mr. Lombardo.

MR. LOMBARDO: I have an exception, your Honor, please.

THE COURT: Yes.

MR. LOMBARDO: On the question of sentence, your Honor, all I can say is that this is a very young man, and he has had a most unfortunate background. As I say, he does stand convicted by a jury. I realize

that your Honor has his own conscience to answer to, and your own convictions, but I ask your Honor to be as merciful as you can, and to temper your justice with mercy.

THE COURT: Mr. Lombardo, in tempering justice with mercy covers a multiple of sins. I don't know what it means, and I doubt whether many people except the theorists, the do-gooders, I doubt whether they know what it means.

The defendant is standing there, hands in pocket, with the attitude of one who just doesn't give a damn, in plain language. This was a particular vicious thing. The clerk in the supermarket asked the man who was shot and killed to take a watchdog into the rear of the store to be fed, I think. Of course you have to have watchdogs today. Some merchants keep the doors locked and they have a little peephole, and they look through it to see if who is at the door is a customer or someone bent upon doing them harm. That's what we have come to, Mr. Lombardo.

A merchant who was supposed to have an

open door inviting the whole world in to do business with him. Just as this dog is taken to the rear of the store, Rickenbacker, a man by the name of Morgan, and a man by the name of Ferguson entered the store. Morgan and this defendant drew revolvers. They drew revolvers and they announced a stickup. Took $200.00 from the cash register. The deceased then returned from the rear of the store and saw the robbery in progress, and he started to rush in. Morgan fired one shot at him. He was pronounced dead of a gunshot wound.

The police officers in the radio patrol car were attracted by the shooting and they took after the defendant, and one officer caught Morgan in an automobile with the driver, a man by the name of Curtis, and a murder weapon that Morgan had dropped. The other officer pursued Ferguson and Rickenbacker. I remember the testimony well. Not only this officer who pursued the defendant with Morgan, but another police officer coming up towards them saw this defendant, gun in hand, running. Morgan and this defendant

parted company. It was obvious that one police officer couldn't go in both directions. This police officer's companion, in the meantime, chased the other perpetrator into the car, so there was one officer left, and when Morgan and Rickenbacker parted company, the officer pursued this defendant. He kept him in view all the time. Ferguson was apprehended, Rickenbacker escaped. Rickenbacker's revolver was recovered when he dropped it in flight.

This defendant was only 23 years of age, and has a juvenile court appearance for robbery at the age of 12. This was dismissed. As an adult, four arrests, possessing burglars' tools, possessing a weapon, possessing stolen property. At the time of the instant arrest, he was on parole on a weapons charge. Well, that figures, that figures.

I suppose there are so many so-called penologists who wouldn't send anybody to jail. Listening to the newly appointed Commissioner of Corrections on the radio last night, he said there isn't a single human being who is beyond rehabilitation.

Well, here is a man with a record. He is on parole as a result of a gun charge. Parole was lodged against him. In any event, this defendant has always blamed, unfortunately he has blamed racial prejudice. Of course there is racial prejudice. There was a lot of racial prejudice, when I was young, against my people. There was a lot of racial prejudice against your people, too, Mr. Lombardo. But it's said that patriotism is the last refuge of a scoundrel. This cry of racial prejudice, also, is the last refuge of a scoundrel. This is just a modern version of what the so-called philosophers used to say about patriotism.

In any event, this defendant has led a carefree life, and he made a claim of employment as an automobile mechanic, a gypsy cab driver, out of the garage operated by his brother. He and his brother were arrested in that garage, charged with converting stolen vehicles into gypsy cabs.

The Probation Department, in whom I have a great deal of faith; these men are trained sociologists, and they say what

the defendant appears to be right now, looking at him, hostile, an aggressive individual with complete contempt for lawfully constituted authority. He continues, they say, to lie, misinform and give misleading information.

Well, that's his attitude, Mr.Lombardo. The whole world is against him. I have seen some of his people go to the highest point of honor, the highest positions of honor that can be bestowed upon anyone, Justices in this court, one of whom I had the pleasure of attending high school, all through high school and law school.

The jury decided the issues, Mr.Lombardo. The entire question of fact was submitted to the jury, and the jury found the defendant to be guilty.

The defendant is committed to the State Department of Correctional Services -- in the old days we used to say "states prison", but I can't do that --State Department of Correctional Services for a minimum of 25 years, and a maximum for the rest of the natural life of this defendant, because

of his conviction of the crime of murder.

THE CLERK: Defendant sentenced to the New York State Department of Correctional Services for 25 years to life.

Robert Rickenbacker, you are advised that judgment is pronounced today and you have a right to appeal. You have 30 days from today with which to file a notice of appeal from this judgment. Notice of appeal must be filed in duplicate with the clerk of the criminal term office in this court, and one copy should be sent to the District Attorney of Kings County.

If you cannot afford a lawyer, apply to the Appellate Division and they will assign a lawyer to you without charge.

THE COURT: Mr. Lombardo, this didn't have to be done, a man shot down in cold blood. He had a right to live, too. All right.

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Certified to be true and correct

Florence S. Campagna

Florence S. Campagna, C.S.R.
Official Court Reporter

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

THE UNITED STATES OF AMERICA ex rel.
ROBERT RICKENBACKER,

Petitioner,

-against-

THE WARDEN, AUBURN CORRECTIONAL FACILITY and THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

- -x

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MEMORANDUM AND ORDER

February 24, 1976

PLATT, D.J.

By a petition for a writ of habeas corpus, Robert Rickenbacker challenges an allegedly illegal conviction imposed by the State of New York in violation of the United States Constitution. Title 28 U.S.C. §§ 2241 and 2254.

Petitioner, a citizen and resident of New York, is currently confined in Matteawan State Hospital, Beacon, New York, in the custody and control of the Director of that institution.[1] He was convicted after a jury trial of the crime of murder and was sentenced in the Supreme Court (Kern, J.) of Kings County to twenty-five (25) years to life imprisonment.

The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Department (People v. Rickenbacker, 46 A.D.2d 740 [2d Dept. 1974]) and

leave to appeal to the New York Court of Appeals was denied on November 14, 1974 (Stevens, J.).

Here, petitioner raises four issues that have been previously presented to the state courts on direct appeal and which he contends violated his constitutional rights: (1) the court's charge on flight coupled with the trial judge's comments was so prejudicial as to deny petitioner a fair trial; (2) a statement by petitioner was introduced at his trial in violation of Miranda v. Arizona, 384 U.S. 436 (1966); (3) his Sixth and Fourteenth Amendment rights were violated when a detective testified regarding his interrogation of petitioner's accomplices; and, (4) he was denied adequate assistance of counsel. As to each of these issues, petitioner has exhausted the available state court remedies and thus those issues are properly before this Court. Title 28 U.S.C. 2254(b). In addition, petitioner alleges for the first time that the trial judge was not an "impartial arbiter" and, therefore, assisted the prosecution's case. This additional claim, never having been presented to the state courts, is not properly before this Court. Picard v. Connor, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512 (1971); United States ex rel. Hayden v. Zelker, 506 F.2d 1228 (2d Cir. 1974); United States ex rel. Daneff v. Henderson, 501 F.2d 1180 (2d Cir. 1974).

I - FACTS

Petitioner and three other men were charged with felony murder and common law murder following a robbery during which one of the victims was shot and killed. Petitioner's three accomplices were apprehended as they attempted to flee from the scene of the crime. Petitioner was arrested approximately nine months later. One of the accomplices entered a guilty plea to a lesser charge, and the remaining two were convicted of murder. Petitioner's first trial ended in a hung jury; the errors he now complains about occurred during his second trial.

II - FLIGHT CHARGE

Petitioner's first contention is that the trial court's charge on flight, coupled with the judge's analysis of the evidence that had been adduced during the trial, was so prejudicial as to deny petitioner a fair trial. Specifically, it argued that the instruction on flight[2] as evidencing a consciousness of guilt failed to comply with the applicable legal standards as set down by the New York Court of Appeals. The cases cited by petitioner do not support his contention that the judge's charge to the jury was in any manner deficient as a matter of law. On the contrary, the charge was a precise statement of every element required by the New York state courts when charging flight. See People v. Baker, 26 N.Y.2d 169, 174 (1971); People v. Yazum, 13 N.Y.2d 302, 304 (1964); People v. Lyra, 1 N.Y.2d 199, 209 (1956). Furthermore,

it is argued that the judge, in commenting on the evidence while charging flight, erroneously stated to the jury that the witnesses in the superette where the robbery occurred had testified that two of the holdup men carried guns. A review of the record shows that the two eyewitnesses testified that three men participated in the robbery and murder, but that only one man was observed to be carrying a gun. However, the testimony of the police officers who chased and apprehended three of the robbers, was that petitioner and one other co-defendant were observed to be carrying guns. Assuming that the judge's misstatement of the facts was error, it was not of such magnitude as to deny petitioner a fair trial. It is a well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. The judge instructed the jury in his opening remarks and again at the conclusion of his charge that,

> "Now, I'll caution you that what I said, it is not my recollection of the testimony of the witnesses, or the recollection of Mr. Lombardo [defense counsel] or the recollection of the District Attorney, it is your recollection which controls and only your recollection." (Record at 225).

Neither of petitioner's challenges to the charge are well taken. When the charge is viewed as a whole, the error, if any, did not rise to the level of a denial of due process. It is settled law that a jury charge in a state trial is normally a matter of state law and is not reviewable on federal habeas corpus unless the alleged errors are so

serious as to deprive the petitioner of a federal constitutional right. Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed2d 368 (1973); United States ex rel. Stanbridge v. Zelker, 514 F.2d 45 (2d Cir. 1975); United States ex rel. Smith v. Montanye, 505 F.2d 1355 (2d Cir. 1974); United States ex rel. Winfield v. Cascles, 403 F.Supp. 956 (E.D.N.Y. 1975).

> "Before a federal court may overturn a state trial . . ., it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, supra, 414 U.S. at 146, 94 S.Ct. at 1359.

The rendering of the flight charge and the judge's accompanying remarks did not violate petitioner's constitutional rights.

III - USE OF PETITIONER'S STATEMENT

On March 11, 1971 approximately nine months after the robbery and murder, Police Detective Robert Marshall encountered petitioner at the 67th Precinct Police Station where Rickenbacker was in custody for an unrelated offense. Before advising petitioner of his constitutional rights as mandated by the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), Marshall questioned petitioner and elicited from him his name and address (63 Decatur Street). During petitioner's trial, Marshall testified about his investigatory efforts regarding the robbery and killing. He testified that on the night of the crime he went to a rooming house at 63 Decatur Street seeking the petitioner, but that he searched the house without success. He further

testified that at various times over the next nine months he kept that address under surveillance and also visited numerous other places and spoke with various people. Petitioner's admission was offered by the prosecution as proof of its contention that Rickenbacker had fled his usual haunts and, in so fleeing, displayed a guilty conscience. Defense counsel argued that petitioner's statement, although innocuous on its face, should have been suppressed for failure to comply with Miranda. The trial court allowed the statement to be introduced, ruling that it only concerned "pedigree" and, therefore, was not governed by the broad prophylactic rule laid down in Miranda.

Petitioner now argues that the admission of his statement, elicited without the benefit of Miranda warnings, violated his Fifth Amendment privilege against self-incrimination.

In United States ex rel. Hines v. LaValle, 521 F.2d 1109 (2d Cir. 1975), a similar argument was made by a state prisoner appealing the denial of his writ of habeas corpus. There, the defendant, while in custody and enroute to the police station, but before being advised of his rights, informed the police, "[I]n response to questions designed to pass the time by seeking background data (i.e., his name, address, age, marital status), that he had been married for 11 years and had 2 children." Hines, supra, at 1110. During the robbery and rape, for which that defendant had been arrested, the assailant had told the victim that he had been married 11 years and had 2 children. The court, after a suppression hearing,

admitted the victim's testimony and that of the arresting officer regarding the defendant's statement to each, respectively, that he had been married 11 years and had 2 children. The Circuit Court, although stating that a person's name, age, address, marital status and similar data, is usually non-incriminatory in character, acknowledged that it "[M]ay in a particular context provide the missing link required to convict." Hines, supra, at 1112. However, the court held that the introduction of the defendant's statement was not error because,

> "[T]he answer furnished by Hines to the arresting officer . . . constituted merely basic identification required for booking purposes, its admission was not barred because of the officer's failure to satisfy Miranda's warning-waiver procedure." Hines, supra, at 1113.

A fortiori, the introduction of the petitioner's statement in the case, sub judice, did not violate Rickenbacker's Fifth Amendment privilege. See also United States v. LaMonica, 472 F.2d 580 (9th Cir. 1972); Farley v. United States, 381 F.2d 357 (5th Cir.), cert. denied, 389 U.S. 942 (1967).

IV - SIXTH AMENDMENT CLAIM

On the evening of the robbery-murder Detective Marshall questioned each of petitioner's co-defendants. As a result of information acquired from the interview, Marshall went to 63 Decatur Street in search of petitioner. At the trial Marshall testified that he spoke with each of the co-defendants and that he thereafter traveled to 63 Decatur Street.

Petitioner argues that the Detective's testimony was a "subtle, indirect and inferential" use of a co-defendant's statement without affording him an opportunity to cross-examine the declarant and, therefore, violated his right to confront witnesses against him as secured to him by the Sixth and Fourteenth Amendments. Bruton v. United States, 391 U.S. 123 (1968). Bruton held that the admission during a joint trial of a non-testifying defendant's extrajudicial statement which implicates a co-defendant, violates the co-defendant's right to confront witnesses against him. Here, petitioner was tried separately from his co-defendants; and, no statement made by a co-defendant was offered against him. There was no testimony that any co-defendant implicated petitioner or that they gave the address where petitioner could be found to the police. Therefore, the "substantial threats to the defendants constitutional rights," which the Supreme Court sought to prohibit by its decision in Bruton are not present in this case.

V - INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's final contention is that the incompetence of his appointed counsel deprived him of his Sixth and Fourteenth Amendment rights to a fair trial. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The burden of proof is of course on petitioner to sustain the allegations of his habeas corpus petition, including the specific claim here under consideration. However,

before examining Rickenbacker's contention, it is appropriate to consider the standards by which these allegations must be weighed. This Circuit has established stringent standards to be applied when passing on the alleged inadequacy of counsel. United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974); United States ex rel. Walker v. Henderson, 492 F.2d 1311, 1312 (2d Cir.), cert. denied, 417 U.S. 972 (1974); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971); United States v. Katz, 425 F.2d 928, 930-31 (2d Cir. 1970); United States v. Currier, 405 F.2d 1039, 1042-43 (2d Cir.), cert. denied, 395 U.S. 914 (1969); United States v. Garguilo, 324 F.2d 795, 796-97 (2d Cir. 1963); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

The showing required to establish inadequacy of counsel was enunciated by this Circuit in United States v. Wight, supra, 176 F.2d at 379:

> ". . . The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus . . . (citations ommitted).
>
> "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court . . . ." (citations ommitted).

That standard, articulated in 1949, has been followed consistently by this Circuit in determining the adequacy of counsel's representation. Most recently, this standard has been characterized as requiring that the representation be so "[W]oefully inadequate 'as to shock the conscience of the Court . . . .'" before a finding of ineffective assistance will be made. United States v. Yanishefsky, supra, 500 F.2d at 1333, quoting United States v. Currier, supra, 405 F.2d at 1043, which in turn quoted from United States v. Wight, supra, at 379. However, "Errorless counsel is not required . . . ." Yanishefsky, supra, at 1333, and "[B]efore we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect.'" United States v. Garguilo, supra, 324 F.2d at 796, quoting Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).

The Court has carefully examined all of Rickenbacker's allegations with respect to his attorney's performance. In doing so, the Court has come to the conclusion that petitioner's attorney did not fail to "present the cause of the accused," or, perform so "ineptly" as to give rise to a valid claim of inadequate assistance under the strict standard laid down in Wight, supra.

Applying these standards to this case, petitioner's claim, viewed in the light most favorable to him, may be

summarized as follows: The prosecution's case was not an overwhelming one and, at petitioner's earlier trial, the jury had been unable to reach a verdict. Defense counsel knew what to expect from the People's witnesses because they had testified at the earlier trial. In light of these facts, petitioner cites four areas where he claims his counsel's performance is suspect: (1) his cross-examination of the police officers who identified petitioner was "brief and perfunctory"; (2) counsel failed to challenge the police officers' facility to identify petitioner in view of the nine month lapse of time between the crime and petitioner's apprehension; (3) there was no objection to the receipt in evidence of the gun petitioner supposedly discarded during the chase; and, (4) the failure to challenge the prosecution's offer of proof of flight. The combination of these errors, it is argued, amounted to a total failure by counsel to adequately represent petitioner.

As is pointed out in the respondent's brief, the flaw in petitioner's claim is that, in essence, he simply differs with defense counsel's strategy. Whether to have cross-examined the police more extensively was a judgment to be made by counsel based upon the facts known to him. Here, counsel had access to the officers' testimony at the earlier trial as well as at the Wade hearing which preceded it. As has been pointed out many times before, the advisability of extensive cross-examination is a matter open to honest differences of opinion. Even if we assume that it was error for counsel to have failed to cross-examine more extensively,

it did not result in a failure to put before the jury the inherent unreliability of eye-witness identification. Counsel devoted much of his summation to this issue as well as to the lapse of time between the crime and petitioner's arrest. It has been consistently held that a court may not grant relief for "[A]lleged tactical errors or mistakes in strategy . . . ." Garguilo, supra, 324 F.2d at 797.

In regard to petitioner's allegation that his counsel failed to object to the introduction in evidence of the gun which he had been observed to be carrying, it is doubtful that any objection made by counsel would have succeeded. Both police officers testified that they saw the gun in petitioner's hand, and Officer Thomas Walsh stated that when petitioner was only 30 or 40 feet from him Rickenbacker threw the gun between two parked cars. Walsh also testified that after losing sight of petitioner he returned immediately to the spot where he had seen petitioner discard the gun and found a gun lying between two cars. Further, each officer identified Officer Scannapieco's initials that had been scratched on the gun when it was initially recovered. Again, experienced counsel may well have determined that an objection would have been futile.

Finally, petitioner maintains that when the prosecution failed to introduce petitioner's relatives and friends to testify on the issue of flight, counsel failed to move to strike the statements by the prosecution in its opening which had promised such evidence. The Court can find no basis in the record to support such an allegation.

The fact is, defense counsel objected to the whole line of questioning of Detective Robert Marshall regarding flight and moved to strike all of the detective's testimony on the ground that a proper foundation had not been laid.

Having studied the record, the Court can find no basis for petitioner's allegation of ineffective assistance of counsel.

Parenthetically it might be added that petitioner's attorney, Joseph Lombardo, Esq., has appeared before this Court on numerous occasions and it is familiar with his skill. Furthermore, the Court is aware of his high reputation as a criminal defense attorney and the fact that he is a former President of the Brooklyn Bar Association. In the present case, Mr. Justice Michael Kern, who presided at petitioner's trial, in commenting on the case after the jury had been discharged, stated:

> "[I]t was really a pleasure to preside at a trial because we have such able lawyers."

This Court finds nothing to support the contention that Mr. Justice Kern erred in his appraisal of Mr. Lombardo's performance. The fact that petitioner was represented at his trial in a manner differently from what petitioner's present attorney would have done is not a basis for setting aside the judgment of conviction. This case is a long way from approaching the standard for ineffective assistance of counsel set forth above.

CONCLUSION

Accordingly it is

ORDERED that the petition be dismissed and the writ of habeas corpus denied.

SO ORDERED.

U.S.D.J.

F O O T N O T E S

1. At the time this petition was filed, petitioner was incarcerated in the Auburn Correctional Facility, Auburn, New York.

2. The court charged as follows:

"Now, I said to you that I would charge you as to what the District Attorney calls 'flight of the defendant.' Madam and gentlemen, the conduct of an accused such as flight or attempted flight is always a proper subject for the consideration of a jury as indicative of a guilty mind and in determining the question of the guilt or innocence of the person charged. Such evidence may be considered under the law if there are facts pointing to the commission of the crime charged as to the motive which prompted such flight. Such evidence is admissible on the theory that an inference of guilt may be drawn from acts which indicate a consciousness of guilt. The District Attorney maintains that this defendant fled, as I have already told you and I have outlined his contention with respect to efforts to arrest the defendant.

"Such evidence, members of the jury, standing alone and with nothing else, is insufficient to warrant a verdict of guilty. It must be supported by other proof of the defendant's involvement in the alleged robbery and killing of a substantial character. Here the District Attorney maintains that the other proof lies in the testimony which he has submitted of witnesses who were in the store and who described the three men to the extent that they said two of them had guns. The District Attorney maintains that such other proof lies in the testimony of police officer Walsh, that is, he saw the defendant, gun in hand, with another man, gun in hand, and a third man running along; that when they gave chase, one of them got into a car and was apprehended, and as I said, the other two, including this defendant, during the course of such chase, threw the gun which he held in his hand underneath an automobile or between two parked automobiles.

2. (Cont'd)

"And so, you see, madam and gentlemen of the jury, it is the District Attorney's contention that by reasoning from the established facts in the case, without recounting, without going over those established facts, which, incidentally, the defendant says or claims are not established facts beyond a reasonable doubt, but drawing inferences from those established facts, the conclusion is irresistible, says the District Attorney. The conclusion flows freely and smoothly and logically to the ultimate conclusion that this defendant was one of the three men in the store at the time of the perpetration of the robbery, and at the time of the shooting of Vito Petrancosta, and that those circumstances, reasoning from such established facts, claims the District Attorney, exclude to a moral certainty every other hypothesis, save that of the guilt of this defendant. Such is the contention of the prosecution.

"The defendant, by his plea of not guilty in this case, denies in toto the contention or the contentions of the District Attorney." (Record at 217-219).

STIPULATION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

ROBERT RICKENBACKER,

Appellant,

v.

THE WARDEN, AUBURN CORRECTIONAL FACILITY
AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.
----------X

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the indictment, found by a Grand Jury in and for the County of Kings and numbered 3853/1970, need not be reproduced in the appendix for this appeal.

Dated: May 21,1976.

Aaron J. Jaffe
AARON J. JAFFE
Counsel for Appellant.

Lillian Z. Cohen
LILLIAN Z. COHEN
Assistant Attorney General
State of new york

SENTENCING MINUTES

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS: CRIMINAL TERM PART 13

Stens 5722B
Appeal 9226

PEOPLE OF THE STATE OF NEW YORK, : Ind.#3853/'70

-against-

ROBERT RICKENBACKER, :

Defendant. :

January 20, 1972

BEFORE:

HON. MICHAEL KERN
Justice

APPEARANCES:

PETER LEAVITT, ESQ., A.D.A.,
For the People

JOSEPH LOMBARDO, ESQ.,
For the Defendant

FLORENCE S. CAMPAGNA, C.S.R.
Official Court Reporter

ss

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BEST COPY AVAILABLE

THE CLERK: What is your name?

DEFT. RICKENBACKER: Robert Rickenbacker.

THE CLERK: Is Mr. Joseph Lombardo, who stands beside you, your attorney?

DEFT. RICKENBACKER: Yes.

THE CLERK: Is there any legal cause or any other cause to show why judgment of the law should not be pronounced upon you at this time?

DEFT. RICKENBACKER: No.

THE CLERK: Are you ready for sentence today?

DEFT. RICKENBACKER: Yes.

THE CLERK: The People have a right to be heard relative to your sentence. You may personally speak to the Court, and of course, your lawyer may speak to the Court. Do the People wish to be heard relative to the sentence of Robert Rickenbacker?

THE COURT: Do the People want to be heard in this case?

MR. LEAVITT: No, your Honor, no request to be heard.

THE CLERK: Robert Rickenbacker, you may speak, your attorney may speak, or you

may both speak. Do you wish to personally speak to the Court?

DEFT. RICKENBACKER: No.

THE CLERK: Mr. Lombardo?

MR. LOMBARDO: If it please, your Honor, I'm aware of the fact that this case was determined by a verdict of the jury. It was a comparatively short case and I know your Honor has a full and complete report. However, at the conclusion of the case, your Honor graciously allowed me to reserve the right to make motions to set aside the verdict at the time of sentence, and I move your Honor to set aside the verdict in this case on the ground that it is contrary to the facts, contrary to the law, contrary to the evidence, contrary to the weight of the evidence, and I particularly rely upon two points, your Honor. One is the issue of identification. The testimony of the identifying witnesses was that they were pursuing several defendants and that the chase, as I recall the testimony, lasted between three and four minutes, and that at five different occasions, turning five

different cornors, the pursuing officers lost sight of the defendant whom they testified that they identified. Officer DiPietro said that he saw him once, and I'm referring, of course, to this defendant, and the other officer, I believe was Officer Walsh, testified that he pursued him for approximately six, seven blocks, and they turned some five corners and he lost sight of him on five occasions. That is point number one on the issue of identification.

However, there is a further point upon which I wish to predicate this motion, and the testimony of Detective Marshal was that after he had arrested defendants who admittedly were at the scene of the crime, he spoke to them and then he went looking for the defendant, Nickenbacker.

In effect, what was being offered here by the prosecution, was testimony by an admitted accomplice without any opportunity for the defense to cross-examine him, and I believe that was done in violation of the Bruton Rule.

THE COURT: Mr.Lombardo, is it your contention that I permitted testimony of a hearsay nature during a trial?

MR. LOMBARDO: Your Honor, the testimony, it wasn't quite that simple. It was a very sophisticated manner in which it was done, and I imply no criticism of your Honor.

THE COURT: Well, Mr. Lombardo, I ought to be severely critisized if I permitted a violation of such a basic rule. My understnding was that the police officer, from the very moment, saw the --as they emerged from this store, saw the three men running, saw one or two get into a car. I don't remember the other defendants. I don't know what happened in that case. I'm only concerned with this defendant. This defendant was tried. What happened to the other case?

MR. LOMBARDO: One was in the car, and one ran into the car, and two ran away.

THE COURT: Are those cases disposed of, by the way?

MR. LOMBARDO: Yes, your Honor.

THE COURT: Not before me?

MR.LOMBARDO: Oh, no, sir.

THE COURT: Now, this case came to trial before me.

MR. LOMBARDO: Correct.

THE COURT: The police officer testified, if I remember correctly, two of them, that they saw this defendant running, gun in hand. At least one of them testified that he kept chasing the defendant, and I think there was something, that he went around the corner into a super market area.

MR. LOMBARDO: That was the last phase of the chase, your Honor.

THE COURT: He apprehended the defendant.

MR. LOMBARDO: He did not apprehend this defendant. No, this defendant was apprehended some nine months later. But there was evidence of flight, your Honor. In an attempt to show flight, the District Attorney elicited fromofficer --from Detective Marshal, that after he had these other defendants in custody, he then went looking for defendant Rickenbacker without any absolute --without any testimony from

anyone that they knew who Rickenbacker was, and the inference was inescapable, your Honor, that at least if I were sitting on the jury, I would have gotten that impression that Detective Marshal had questioned the other three defendants, and they had told him that Rickenbacker was the fourth man, and they immediately went looking for Rickenbacker, and the testimony was they went to the Times Plaza Hotel, they went to a garage, they went to the home where he lived.

THE COURT: Mr. Lombardo, did the detective testify on the witness stand, in the trial, that the other defendants told them that Rickenbacker was the other man?

MR. LOMBARDO: No, your Honor.

THE COURT: That never came before the jury?

MR. LOMBARDO: No, your Honor, that did not come before the jury. That's why I say it was done in a very sophisticated manner. Unfortunately, your Honor, there was some question about whether or not we could get the minutes in the course of the trial, and

the decision was made that we didn't require the minutes. So, I can't point it out to your Honor, but I say to your Honor, my recollection is absolutely accurate as far as I can relate on the question of the officer who chased this man, lost sight of him five times. There were four corners turned. There were, apparently, four people implicated in this crime; one was in an automobile, three ran out of the store, and they ran to this vehicle. One got into the vehicle, at which time they were apprehended by the police. Then, two ran away. Officer Walsh chased the defendant.

THE COURT: Both officers identified this defendant as one of the men running away.

MR. LOMBARDO: Right.

THE COURT: This defendant, gun in hand.

MR. LOMBARDO: Yes, your Honor. And there was another point that I made. There was absolutely no testimony of any fingerprints of this defendant on that gun. The testimony of the police officer who chased

the two men that ran away was that one of them whom he said was the defendant, threw a gun underneath a parked automobile. The gun was recovered. There was absolutely no testimony about any fingerprints on that gun, and mind you now, this was within a matter of seconds after the gun had supposedly left the hand of this defendant.

But even more important than that, your Honor, is the fact that the police officer, Walsh, captured one of the men. The other man, whom he said was this defendant, got away, was not arrested until nine months later.

The record will bear me out, that Detective Marshal testified that --mind you now, three defendants, two were caught practically at the scene of the crime, and the third one was picked up by Officer Walsh in the course of the chase. He said that when they got to the police station, he then went looking for Rickenbacker, but there was no testimony as to how he knew that Rickenbacker was the fourth man. I repeat,

the conclusion is inescapable, your Honor, that the jury would get the impression that these three men said Rickenbacker was the fourth man. Since these three men were accomplices, in effect what was be ng done here was to use the testimony of an accomplice without the right of cross-examination offered to the defense in violation, I say, of the Bruton Rule. I repeat, that is no reflection on your Honor, and it isn't meant to be, but I'm simply here doing my duty.

I realize that there will probably be an appeal in this case, I think the Appellate counsel, in this case, should have the benefit on the record of my recollection, and thoughts about this case. I repeat, there is certainly nothing in what your Honor said, nor did I insinuate or did I think that your Honor would allow that testimony.

THE COURT: Mr. Lombardo, I wouldn't even indirectly attribute anything like that to you. Of course not. You have a perfect right to find fault with rulings

made by a judge. You have a perfect right to criticize what a judge did, that you believe should not have been done. That is well within your rights as the good attorney that you are. There is no doubt about that. I am not taking any offense at all. As a matter of fact, the motion that you are making now is the kind of motion that a real lawyer would make, and you have given this defendant the kind of a defense and the kind of representation that he couldn't pay, that he couldn't possibly pay for, and I know you get nothing for this, unless we talk about a big $500.00 or $750.00 as compensation paid for by the tax payers.

Well, your motion is denied, Mr. Lombardo.

MR. LOMBARDO: I have an exception, your Honor, please.

THE COURT: Yes.

MR. LOMBARDO: On the question of sentence, your Honor, all I can say is that this is a very young man, and he has had a most unfortunate background. As I say, he does stand convicted by a jury. I realize

that your Honor has his own conscience to answer to, and your own convictions, but I ask your Honor to be as merciful as you can, and to temper your justice with mercy.

THE COURT: Mr. Lombardo, in tempering justice with mercy covers a multiple of sins. I don't know what it means, and I doubt whether many people except the theorists, the do-gooders, I doubt whether they know what it means.

The defendant is standing there, hands in pocket, with the attitude of one who just doesn't give a damn, in plain language. This was a particular vicious thing. The clerk in the supermarket asked the man who was shot and killed to take a watchdog into the rear of the store to be fed, I think. Of course you have to have watchdogs today. Some merchants keep the doors locked and they have a little peephole, and they look through it to see if who is at the door is a customer or someone bent upon doing them harm. That's what we have come to, Mr. Lombardo.

A merchant who was supposed to have an

open door inviting the whole world in to do business with him. Just as this dog is taken to the rear of the store, Rickenbacker, a man by the name of Morgan, and a man by the name of Ferguson entered the store. Morgan and this defendant drew revolvers. They drew revolvers and they announced a stickup. Took $200.00 from the cash register. The deceased then returned from the rear of the store and saw the robbery in progress, and he started to rush in. Morgan fired one shot at him. He was pronounced dead of a gunshot wound.

The police officers in the radio patrol car were attracted by the shooting and they took after the defendant, and one officer caught Morgan in an automobile with the driver, a man by the name of Curtis, and a murder weapon that Morgan had dropped. The other officer pursued Ferguson and Rickenbacker. I remember the testimony well. Not only this officer who pursued the defendant with Morgan, but another police officer coming up towards them saw this defendant, gun in hand, running. Morgan and this defendant

parted company. It was obvious that one police officer couldn't go in both directions. This police officer's companion, in the meantime, chased the other perpetrator into the car, so there was one officer left, and when Morgan and Rickenbacker parted company, the officer pursued this defendant. He kept him in view all the time. Ferguson was apprehended, Rickenbacker escaped. Rickenbacker's revolver was recovered when he dropped it in flight.

This defendant was only 23 years of age, and has a juvenile court appearance for robbery at the age of 12. This was dismissed. As an adult, four arrests, possessing burglars' tools, possessing a weapon, possessing stolen property. At the time of the instant arrest, he was on parole on a weapons charge. Well, that figures, that figures.

I suppose there are so many so-called penologists who wouldn't send anybody to jail. Listening to the newly appointed Commissioner of Corrections on the radio last night, he said there isn't a single human being who is beyond rehabilitation.

Well, here is a man with a record. He is on parole as a result of a gun charge. Parole was lodged against him. In any event, this defendant has always blamed, unfortunately he has blamed racial prejudice. Of course there is racial prejudice. There was a lot of racial prejudice, when I was young, against my people. There was a lot of racial prejudice against your people, too, Mr. Lombardo. But it's said that patriotism is the last refuge of a scoundrel. This cry of racial prejudice, also, is the last refuge of a scoundrel. This is just a modern version of what the so-called philosophers used to say about patriotism.

In any event, this defendant has led a carefree life, and he made a claim of employment as an automobile mechanic, a gypsy cab driver, out of the garage operated by his brother. He and his brother were arrested in that garage, charged with converting stolen vehicles into gypsy cabs.

The Probation Department, in whom I have a great deal of faith; these men are trained sociologists, and they say what

the defendant appears to be right now, looking at him, hostile, an aggressive individual with complete contempt for lawfully constituted authority. He continues, they say, to lie, misinform and give misleading information.

Well, that's his attitude, Mr.Lombardo. The whole world is against him. I have seen some of his people go to the highest point of honor, the highe t positions of honor that can be bestowed upon anyone, Justices in this court, one of whom I had the pleasure of attending high school, all through high school and law school.

The jury decided the issues, Mr.Lombardo. The entire question of fact was submitted to the jury, and the jury found the defendant to be guilty.

The defendant is committed to the State Department of Correctional Services -- in the old days we used to say "states prison", but I can't do that --State Department of Correctional Services for a minimum of 25 years, and a maximum for the rest of the natural life of this defendant, because

of his conviction of the crime of murder.

THE CLERK: Defendant sentenced to the New York State Department of Correctional Services for 25 years to life.

Robert Rickenbacker, you are advised that judgment is pronounced today and you have a right to appeal. You have 30 days from today with which to file a notice of appeal from this judgment. Notice of appeal must be filed in duplicate with the clerk of the criminal term office in this court, and one copy should be sent to the District Attorney of Kings County.

If you cannot afford a lawyer, apply to the Appellate Division and they will assign a lawyer to you without charge.

THE COURT: Mr. Lombardo, this didn't have to be done, a man shot down in cold blood. He had a right to live, too. All right.

****

Certified to be true and correct

Florence S. Campagna

Florence S. Campagna, C.S.R.
Official Court Reporter

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -x

THE UNITED STATES OF AMERICA ex rel.
ROBERT RICKENBACKER,

Petitioner,

-against-

THE WARDEN, AUBURN CORRECTIONAL FACILITY and THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

- -x

75 C 634

MEMORANDUM AND ORDER

February 24, 1976

PLATT, D.J.

By a petition for a writ of habeas corpus, Robert Rickenbacker challenges an allegedly illegal conviction imposed by the State of New York in violation of the United States Constitution. Title 28 U.S.C. §§ 2241 and 2254.

Petitioner, a citizen and resident of New York, is currently confined in Matteawan State Hospital, Beacon, New York, in the custody and control of the Director of that institution.[1] He was convicted after a jury trial of the crime of murder and was sentenced in the Supreme Court (Kern, J.) of Kings County to twenty-five (25) years to life imprisonment.

The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Department (People v. Rickenbacker, 46 A.D.2d 740 [2d Dept. 1974]) and

leave to appeal to the New York Court of Appeals was denied on November 14, 1974 (Stevens, J.).

Here, petitioner raises four issues that have been previously presented to the state courts on direct appeal and which he contends violated his constitutional rights: (1) the court's charge on flight coupled with the trial judge's comments was so prejudicial as to deny petitioner a fair trial; (2) a statement by petitioner was introduced at his trial in violation of Miranda v. Arizona, 384 U.S. 436 (1966); (3) his Sixth and Fourteenth Amendment rights were violated when a detective testified regarding his interrogation of petitioner's accomplices; and, (4) he was denied adequate assistance of counsel. As to each of these issues, petitioner has exhausted the available state court remedies and thus those issues are properly before this Court. Title 28 U.S.C. 2254(b). In addition, petitioner alleges for the first time that the trial judge was not an "impartial arbiter" and, therefore, assisted the prosecution's case. This additional claim, never having been presented to the state courts, is not properly before this Court. Picard v. Connor, 404 U.S. 270, 275-76, 92 S.Ct. 509, 512 (1971); United States ex rel. Hayden v. Zelker, 506 F.2d 1228 (2d Cir. 1974); United States ex rel. Daneff v. Henderson, 501 F.2d 1180 (2d Cir. 1974).

I - FACTS

Petitioner and three other men were charged with felony murder and common law murder following a robbery during which one of the victims was shot and killed. Petitioner's three accomplices were apprehended as they attempted to flee from the scene of the crime. Petitioner was arrested approximately nine months later. One of the accomplices entered a guilty plea to a lesser charge, and the remaining two were convicted of murder. Petitioner's first trial ended in a hung jury; the errors he now complains about occurred during his second trial.

II - FLIGHT CHARGE

Petitioner's first contention is that the trial court's charge on flight, coupled with the judge's analysis of the evidence that had been adduced during the trial, was so prejudicial as to deny petitioner a fair trial. Specifically, it argued that the instruction on flight[2] as evidencing a consciousness of guilt failed to comply with the applicable legal standards as set down by the New York Court of Appeals. The cases cited by petitioner do not support his contention that the judge's charge to the jury was in any manner deficient as a matter of law. On the contrary, the charge was a precise statement of every element required by the New York state courts when charging flight. See People v. Baker, 26 N.Y.2d 169, 174 (1971); People v. Yazum, 13 N.Y.2d 302, 304 (1964); People v. Leyra, 1 N.Y.2d 199, 209 (1956). Furthermore,

it is argued that the judge, in commenting on the evidence while charging flight, erroneously stated to the jury that the witnesses in the superette where the robbery occurred had testified that two of the holdup men carried guns. A review of the record shows that the two eyewitnesses testified that three men participated in the robbery and murder, but that only one man was observed to be carrying a gun. However, the testimony of the police officers who chased and apprehended three of the robbers, was that petitioner and one other co-defendant were observed to be carrying guns. Assuming that the judge's misstatement of the facts was error, it was not of such magnitude as to deny petitioner a fair trial. It is a well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. The judge instructed the jury in his opening remarks and again at the conclusion of his charge that,

> "Now, I'll caution you that what I said, it is not my recollection of the testimony of the witnesses, or the recollection of Mr. Lombardo [defense counsel] or the recollection of the District Attorney, it is your recollection which controls and only your recollection." (Record at 225).

Neither of petitioner's challenges to the charge are well taken. When the charge is viewed as a whole, the error, if any, did not rise to the level of a denial of due process. It is settled law that a jury charge in a state trial is normally a matter of state law and is not reviewable on federal habeas corpus unless the alleged errors are so

serious as to deprive the petitioner of a federal constitutional right. Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed2d 368 (1973); United States ex rel. Stanbridge v. Zelker, 514 F.2d 45 (2d Cir. 1975); United States ex rel. Smith v. Montanye, 505 F.2d 1355 (2d Cir. 1974); United States ex rel. Winfield v. Cascles, 403 F.Supp. 956 (E.D.N.Y. 1975).

> "Before a federal court may overturn a state trial . . ., it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." Cupp v. Naughten, supra, 414 U.S. at 146, 94 S.Ct. at 1359.

The rendering of the flight charge and the judge's accompanying remarks did not violate petitioner's constitutional rights.

III - USE OF PETITIONER'S STATEMENT

On March 11, 1971 approximately nine months after the robbery and murder, Police Detective Robert Marshall encountered petitioner at the 67th Precinct Police Station where Rickenbacker was in custody for an unrelated offense. Before advising petitioner of his constitutional rights as mandated by the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966), Marshall questioned petitioner and elicited from him his name and address (63 Decatur Street). During petitioner's trial, Marshall testified about his investigatory efforts regarding the robbery and killing. He testified that on the night of the crime he went to a rooming house at 63 Decatur Street seeking the petitioner, but that he searched the house without success. He further

testified that at various times over the next nine months he kept that address under surveillance and also visited numerous other places and spoke with various people. Petitioner's admission was offered by the prosecution as proof of its contention that Rickenbacker had fled his usual haunts and, in so fleeing, displayed a guilty conscience. Defense counsel argued that petitioner's statement, although innocuous on its face, should have been suppressed for failure to comply with Miranda. The trial court allowed the statement to be introduced, ruling that it only concerned "pedigree" and, therefore, was not governed by the broad prophylactic rule laid down in Miranda.

Petitioner now argues that the admission of his statement, elicited without the benefit of Miranda warnings, violated his Fifth Amendment privilege against self-incrimination.

In United States ex rel. Hines v. LaValle, 521 F.2d 1109 (2d Cir. 1975), a similar argument was made by a state prisoner appealing the denial of his writ of habeas corpus. There, the defendant, while in custody and enroute to the police station, but before being advised of his rights, informed the police, "[I]n response to questions designed to pass the time by seeking background data (i.e., his name, address, age, marital status), that he had been married for 11 years and had 2 children." Hines, supra, at 1110. During the robbery and rape, for which that defendant had been arrested, the assailant had told the victim that he had been married 11 years and had 2 children. The court, after a suppression hearing,

admitted the victim's testimony and that of the arresting officer regarding the defendant's statement to each, respectively, that he had been married 11 years and had 2 children. The Circuit Court, although stating that a person's name, age, address, marital status and similar data, is usually non-incriminatory in character, acknowledged that it "[M]ay in a particular context provide the missing link required to convict." Hines, supra, at 1112. However, the court held that the introduction of the defendant's statement was not error because,

> "[T]he answer furnished by Hines to the arresting officer . . . constituted merely basic identification required for booking purposes, its admission was not barred because of the officer's failure to satisfy Miranda's warning-waiver procedure." Hines, supra, at 1113.

A fortiori, the introduction of the petitioner's statement in the case, sub judice, did not violate Rickenbacker's Fifth Amendment privilege. See also United States v. LaMonica, 472 F.2d 580 (9th Cir. 1972); Farley v. United States, 381 F.2d 357 (5th Cir.), cert. denied, 389 U.S. 942 (1967).

IV - SIXTH AMENDMENT CLAIM

On the evening of the robbery-murder Detective Marshall questioned each of petitioner's co-defendants. As a result of information acquired from the interview, Marshall went to 63 Decatur Street in search of petitioner. At the trial Marshall testified that he spoke with each of the co-defendants and that he thereafter traveled to 63 Decatur Street.

Petitioner argues that the Detective's testimony was a "subtle, indirect and inferential" use of a co-defendant's statement without affording him an opportunity to cross-examine the declarant and, therefore, violated his right to confront witnesses against him as secured to him by the Sixth and Fourteenth Amendments. Bruton v. United States, 391 U.S. 123 (1968). Bruton held that the admission during a joint trial of a non-testifying defendant's extrajudicial statement which implicates a co-defendant, violates the co-defendant's right to confront witnesses against him. Here, petitioner was tried separately from his co-defendants; and, no statement made by a co-defendant was offered against him. There was no testimony that any co-defendant implicated petitioner or that they gave the address where petitioner could be found to the police. Therefore, the "substantial threats to the defendants constitutional rights," which the Supreme Court sought to prohibit by its decision in Bruton are not present in this case.

V - INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner's final contention is that the incompetence of his appointed counsel deprived him of his Sixth and Fourteenth Amendment rights to a fair trial. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The burden of proof is of course on petitioner to sustain the allegations of his habeas corpus petition, including the specific claim here under consideration. However,

before examining Rickenbacker's contention, it is appropriate to consider the standards by which these allegations must be weighed. This Circuit has established stringent standards to be applied when passing on the alleged inadequacy of counsel. United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974); United States ex rel. Walker v. Henderson, 492 F.2d 1311, 1312 (2d Cir.), cert. denied, 417 U.S. 972 (1974); United States ex rel. Marcelin v. Mancusi, 462 F.2d 36, 42 (2d Cir. 1972), cert. denied, 410 U.S. 917 (1973); United States ex rel. Scott v. Mancusi, 429 F.2d 104, 109 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971); United States v. Katz, 425 F.2d 928, 930-31 (2d Cir. 1970); United States v. Currier, 405 F.2d 1039, 1042-43 (2d Cir.), cert. denied, 395 U.S. 914 (1969); United States v. Garguilo, 324 F.2d 795, 796-97 (2d Cir. 1963); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950).

The showing required to establish inadequacy of counsel was enunciated by this Circuit in United States v. Wight, supra, 176 F.2d at 379:

> ". . . The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice as grounds for the issuance of a writ of habeas corpus . . . (citations ommitted).
>
> "A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court . . . ." (citations ommitted).

That standard, articulated in 1949, has been followed consistently by this Circuit in determining the adequacy of counsel's representation. Most recently, this standard has been characterized as requiring that the representation be so "[W]oefully inadequate 'as to shock the conscience of the Court . . . .'" before a finding of ineffective assistance will be made. United States v. Yanishefsky, supra, 500 F.2d at 1333, quoting United States v. Currier, supra, 405 F.2d at 1043, which in turn quoted from United States v. Wight, supra, at 379. However, "Errorless counsel is not required . . . ." Yanishefsky, supra, at 1333, and "[B]efore we may vacate a conviction there must be a 'total failure to present the cause of the accused in any fundamental respect.'" United States v. Garguilo, supra, 324 F.2d at 796, quoting Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).

The Court has carefully examined all of Rickenbacker's allegations with respect to his attorney's performance. In doing so, the Court has come to the conclusion that petitioner's attorney did not fail to "present the cause of the accused," or, perform so "ineptly" as to give rise to a valid claim of inadequate assistance under the strict standard laid down in Wight, supra.

Applying these standards to this case, petitioner's claim, viewed in the light most favorable to him, may be

summarized as follows: The prosecution's case was not an overwhelming one and, at petitioner's earlier trial, the jury had been unable to reach a verdict. Defense counsel knew what to expect from the People's witnesses because they had testified at the earlier trial. In light of these facts, petitioner cites four areas where he claims his counsel's performance is suspect: (1) his cross-examination of the police officers who identified petitioner was "brief and perfunctory"; (2) counsel failed to challenge the police officers' facility to identify petitioner in view of the nine month lapse of time between the crime and petitioner's apprehension; (3) there was no objection to the receipt in evidence of the gun petitioner supposedly discarded during the chase; and, (4) the failure to challenge the prosecution's offer of proof of flight. The combination of these errors, it is argued, amounted to a total failure by counsel to adequately represent petitioner.

As is pointed out in the respondent's brief, the flaw in petitioner's claim is that, in essence, he simply differs with defense counsel's strategy. Whether to have cross-examined the police more extensively was a judgment to be made by counsel based upon the facts known to him. Here, counsel had access to the officers' testimony at the earlier trial as well as at the Wade hearing which preceded it. As has been pointed out many times before, the advisability of extensive cross-examination is a matter open to honest differences of opinion. Even if we assume that it was error for counsel to have failed to cross-examine more extensively,

it did not result in a failure to put before the jury the inherent unreliability of eye-witness identification. Counsel devoted much of his summation to this issue as well as to the lapse of time between the crime and petitioner's arrest. It has been consistently held that a court may not grant relief for "[A]lleged tactical errors or mistakes in strategy . . . ." Garguilo, supra, 324 F.2d at 797.

In regard to petitioner's allegation that his counsel failed to object to the introduction in evidence of the gun which he had been observed to be carrying, it is doubtful that any objection made by counsel would have succeeded. Both police officers testified that they saw the gun in petitioner's hand, and Officer Thomas Walsh stated that when petitioner was only 30 or 40 feet from him Rickenbacker threw the gun between two parked cars. Walsh also testified that after losing sight of petitioner he returned immediately to the spot where he had seen petitioner discard the gun and found a gun lying between two cars. Further, each officer identified Officer Scannapieco's initials that had been scratched on the gun when it was initially recovered. Again, experienced counsel may well have determined that an objection would have been futile.

Finally, petitioner maintains that when the prosecution failed to introduce petitioner's relatives and friends to testify on the issue of flight, counsel failed to move to strike the statements by the prosecution in its opening which had promised such evidence. The Court can find no basis in the record to support such an allegation.

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The fact is, defense counsel objected to the whole line of questioning of Detective Robert Marshall regarding flight and moved to strike all of the detective's testimony on the ground that a proper foundation had not been laid.

Having studied the record, the Court can find no basis for petitioner's allegation of ineffective assistance of counsel.

Parenthetically it might be added that petitioner's attorney, Joseph Lombardo, Esq., has appeared before this Court on numerous occasions and it is familiar with his skill. Furthermore, the Court is aware of his high reputation as a criminal defense attorney and the fact that he is a former President of the Brooklyn Bar Association. In the present case, Mr. Justice Michael Kern, who presided at petitioner's trial, in commenting on the case after the jury had been discharged, stated:

> "[I]t was really a pleasure to preside at a trial because we have such able lawyers."

This Court finds nothing to support the contention that Mr. Justice Kern erred in his appraisal of Mr. Lombardo's performance. The fact that petitioner was represented at his trial in a manner differently from what petitioner's present attorney would have done is not a basis for setting aside the judgment of conviction. This case is a long way from approaching the standard for ineffective assistance of counsel set forth above.

CONCLUSION

Accordingly it is

ORDERED that the petition be dismissed and the writ of habeas corpus denied.

SO ORDERED.

U.S.D.J.

F O O T N O T E S

1. At the time this petition was filed, petitioner was incarcerated in the Auburn Correctional Facility, Auburn, New York.

2. The court charged as follows:

"Now, I said to you that I would charge you as to what the District Attorney calls 'flight of the defendant.' Madam and gentlemen, the conduct of an accused such as flight or attempted flight is always a proper subject for the consideration of a jury as indicative of a guilty mind and in determining the question of the guilt or innocence of the person charged. Such evidence may be considered under the law if there are facts pointing to the commission of the crime charged as to the motive which prompted such flight. Such evidence is admissible on the theory that an inference of guilt may be drawn from acts which indicate a consciousness of guilt. The District Attorney maintains that this defendant fled, as I have already told you and I have outlined his contention with respect to efforts to arrest the defendant.

"Such evidence, members of the jury, standing alone and with nothing else, is insufficient to warrant a verdict of guilty. It must be supported by other proof of the defendant's involvement in the alleged robbery and killing of a substantial character. Here the District Attorney maintains that the other proof lies in the testimony which he has submitted of witnesses who were in the store and who described the three men to the extent that they said two of them had guns. The District Attorney maintains that such other proof lies in the testimony of police officer Walsh, that is, he saw the defendant, gun in hand, with another man, gun in hand, and a third man running along; that when they gave chase, one of them got into a car and was apprehended, and as I said, the other two, including this defendant, during the course of such chase, threw the gun which he held in his hand underneath an automobile or between two parked automobiles.

2. (Cont'd)

"And so, you see, madam and gentlemen of the jury, it is the District Attorney's contention that by reasoning from the established facts in the case, without recounting, without going over those established facts, which, incidentally, the defendant says or claims are not established facts beyond a reasonable doubt, but drawing inferences from those established facts, the conclusion is irresistible, says the District Attorney. The conclusion flows freely and smoothly and logically to the ultimate conclusion that this defendant was one of the three men in the store at the time of the perpetration of the robbery, and at the time of the shooting of Vito Petrancosta, and that those circumstances, reasoning from such established facts, claims the District Attorney, exclude to a moral certainty every other hypothesis, save that of the guilt of this defendant. Such is the contention of the prosecution.

"The defendant, by his plea of not guilty in this case, denies in toto the contention or the contentions of the District Attorney." (Record at 217-219).

STIPULATION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

ROBERT RICKENBACKER,

Appellant,

v.

THE WARDEN, AUBURN CORRECTIONAL FACILITY
AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.
----------X

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the indictment, found by a Grand Jury in and for the County of Kings and numbered 3853/1970, need not be reproduced in the appendix for this appeal.

Dated: May 21,1976.

Aaron J. Jaffe
AARON J. JAFFE
Counsel for Appellant.

Lillian Z. Cohen
LILLIAN Z. COHEN
Assistant Attorney General
State of new york

JAFFED Rickenbacker 2240

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of May 197 6 deponent served the within Appendix upon:

Hon. Louis J. Lefkowitz
Attorney General

attorney(s) for

Respondents

in this action, at

2 World Trade Center
New York, N.Y.

1 true copy

the address(es) designated by said attorney(s) for that purpose by depositing ~~a true copy~~ of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Sworn to before me, this 26
day of May, 197 6

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1977